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ABSTRACT

The purpose of this compendium is to provide tools for college and university counsel and administrators to consider their institution's approach concerning the balance of First Amendment values with the harm caused by racial harassment. Section I examines the development of the University of Michigan's initial policy broadly regulating harassment, offering background to the university's experience, the judge's decision, and the revised policy adopted in response to the court decision. Section II consists of sample policies adopted or proposed by colleges and universities, including Stanford University, University of Texas, University of California, University of Wisconsin, University of North Carolina at Charlotte, and Emory University. This section also includes the New York University School of Law's procedures for student discipline, including a broad definition of discipline for "bias," and the Harvard Law School Guidelines for student-sponsored speakers, which include a statement of principle on the "right to dissent" and some examples suggesting the limits of "acceptable dissent." Section III includes selected articles, commentary, and outlines, including, among others: "Public Response to Racist Speech: Considering the Victim's Story" (Mari J. Matsuda); "Looking Ahead to the 1990's: Constitutional Law and American Colleges and Universities" (Martha Minow); "Freedom of Expression under the First Amendment and Racial Harassment on Campus" (Jane Brandt Bulbin); "Racial Harassment at Universities: Legal Issues To Consider when Developing and Implementing a Racial Harassment Policy" (Walter B. Connolly, Jr., and Alison B. Marshall); "The Constitutional Status of Expressive Conduct after the Flag-Burning Decision" (Lawrence White); and "Bibliography: The First Amendment and Racial Harassment on Campus" (Jane Brandt Bulbin and others.) (JDD)

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REGULATING RACIAL HARASSMENT ON CAMPUS:

A LEGAL COMPENDIUM

Edited by

Thomas P. Hustoles and Walter B. Connolly, Jr.

HE024268

National Association of College
and University Attorneys

1990

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EDITORS' INTRODUCTION

> "...if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought we hate." -- Gitlow v. New York, 268 U.S. 652, 672-673; Justice Oliver Wendell Holmes, dissenting.

> "...an absolutist first amendment response to hate speech has the effect of perpetuating racism: Tolerance of hate speech is not tolerance borne by the community at large. Rather, it is a psychic tax imposed on those least able to pay."
> "Frozen at the first amendment bulkhead we watch the rising tide of racial hatred wash over our schools and workplaces." -- Professor Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 Michigan Law Review 2320, 2323, 2360 (1989).

The tension between traditional First Amendment values and abhorrence of racist speech illustrated by the above quotations is the principal legal aspect of the much broader national problem of an escalation of racial incidents on campus. There is no debate over whether this problem exists, and it has been highlighted in summary fashion by some recent general reports.

The National Institute Against Prejudice and Violence (based in Baltimore) has stated that since 1986 more than 250 colleges and universities have reported racist incidents.

The Carnegie Foundation for the Advancement of Teaching released in May of 1990 the results of its survey of 500 university presidents and student affairs officers, and interviews with students, faculty, and administrators. This study, entitled "Campus Life: In Search of Community," reports that the presidents believed that racial and ethnic divisions are deepening, and 24 percent indicate racial tensions as a major problem. The report found a "breakdown in civility," and that "[t]he idyllic vision so routinely portrayed in college promotional materials often masks disturbing realities of student life masks disturbing realities of student life," including racism, sexism, and anti-Semitism. However, as to regulating the problem, the report states that "[r]estrictive codes...do not provide a satisfactory response to offensive language."

Time Magazine published an article on May 7, 1990 entitled "Bigots in the Ivory Tower," subtitled "An alarming rise in hatred roils U.S. campuses." In addition to citing the above two reports, the article describes many specific incidents illustrating the problem, and concludes by issuing the following critique of efforts to regulate racial harassment:

> But some antidotes, however well intentioned, may prove more toxic than the racial poisons they are meant to cure. Nowhere is the First Amendment more imperiled

> than on college campuses. In the past two years nearly a dozen schools have cobbled together policies outlawing insulting and demeaning speech... Yet if such bans succeed in suppressing obnoxious impulses, they merely drive them underground -- along with many ideas that deserve to be aired, if only to kindle a more heated debate.

A more balanced general description of collegiate efforts to regulate racial incidents was reported in The Chronicle of Higher Education, October 4, 1989, in an article entitled "Colleges' Anti-Harassment Policies Bring Controversy Over Free-Speech Issues," by Robin Wilson. The article notes that colleges have taken two basic approaches in adopting anti-harassment plans. The first is a broad, aggressive approach generally prohibiting all types of derogatory, stigmatizing, intimidating, or offensive behavior; while the second is a narrower approach, punishing students only for intentional verbal or physical attacks directed against a specific student or group of students. Obviously, private colleges have more leeway in adopting the broader approach, since although they may feel bound by tradition to the spirit of the First Amendment, they are not otherwise bound.

The problem of balancing First Amendment and academic freedom values against the seriousness of the harm caused by racial incidents, and the university's commitments to equal educational opportunity and dignity, is such that there are no easy solutions to drafting a racial anti-harassment policy which will please all constituencies. The nature of the policy which you adopt may well be as much the result of overriding political, social, and moral values as opposed to legal concerns. The narrower the policy is, i.e., the more it is strictly limited to regulating "fighting words," or "incitement to riot," or to "clear and present dangers," or to "intentional infliction of emotional distress," or to violations of existing criminal or civil law, the easier it will be to defend in court. Broader, more aggressive policies will satisfy the legitimate outcry that racial harassment needs to be strongly regulated, but may well fail a particular judge's perception of the First Amendment. On the other hand, if creative efforts are not attempted to expand the state of the law beyond traditional notions of First Amendment exceptions, then the law will remain static and unresponsive to the very real harm caused by racist hate speech. As argued by Professor Matsuda in her article included in this compendium, exceptions to First Amendment restrictions already exist in many areas beyond those cited above, including obscenity, child pornography, defamation, and commercial and industrial relations matters. An exception for a narrowly defined category of racist hate speech, as eloquently argued for by Professor Matsuda, is not beyond the reach of legal development in this area, but some institution must be prepared to undergo the expensive task of defending the inevitable court challenge, with the concomitant risk that the challenge may well be successful.

The purpose of this compendium, therefore, is not to give out easy solutions to legal problems that may be insoluble even with litigation, or to provide a "model code" in an area where the ends to be accomplished by the code will vary according to the goals a particular university seeks to achieve by its policy. Rather, it is to provide some tools for college and university counsel and administrators to intelligently consider the approach their institution wishes to take.

To that end, the following materials are divided into three basic sections. Because the University of Michigan's initial policy broadly regulating harassment was the first to result in a court opinion regarding its legality vis-a-vis the First Amendment, Section I treats its policy development as a valuable case study. The background to the University of Michigan's experience is introduced by current General Counsel Elsa Kircher Cole, and Judge Cohn's decision is reprinted, along with the policy and interpretive guide the opinion addresses, and the "interim" policy adopted afterwards in response to the decision.

Section II consists of various sample policies adopted or proposed by colleges and universities. The policies from Stanford University and the University of California exemplify, as far as regulation of speech goes, narrowly tailored efforts limited to individualized, intentional incidents, which expressly incorporate the "fighting words" exception recognized by the First Amendment. The University of Wisconsin policy, adopted into the Wisconsin Administrative Code, although requiring intent and behavior directed at an individual, makes a broader reference to "demeaning" speech creating an "intimidating, hostile or demeaning environment" without any specific reference to "fighting words." Examples are given in the policy of specific conduct which would violate the policy. A suit was filed in April of 1990 by lawyers representing the ACLU challenging the policy as too broad and vague. Commentary on the Wisconsin policy by Lawrence A. Weinstein is also included.

The University of Texas policy exemplifies a narrowly tailored policy defining "racial harassment" as "extreme or outrageous acts" intended to harass, intimidate, or humiliate. The "Report of the President's Ad Hoc Committee on Racial Harassment" is an interesting case study of the reasoning by which the particular policy was adopted, including many citations to pertinent legal authorities, and the Committee's rationale for rejecting a "fighting words" approach.

The University of North Carolina at Charlotte policy broadly defines racial harassment and includes a procedure for resolution that specifies mediation and informal attempts to solve the problem prior to formal attempts.

The Emory University policy exemplifies a very broad prohibition of harassment, including racial and sexual harassment. Other institutions reported to have very broad policies not reproduced here include the University of Connecticut and the University of Pennsylvania (see The Chronicle of Higher Education, October 4, 1989, p. A38).

Section II also includes the New York University School of Law's extensive procedures for student discipline, including a broad definition of discipline for "bias," and the Harvard Law School Guidelines for student sponsored speakers, which include a statement of principle on the "right to dissent," and some examples suggesting the limits of "acceptable dissent."

Section III of this compendium includes various "advocacy" pieces, followed by outlines presented by speakers on drafting policies or related issues.

The articles or papers included by Professors Matsuda, Lawrence, and Minow advocate a creative re-examination of First Amendment jurisprudence with an eye toward recognizing that the very real harm that racist speech causes can serve as the basis for increased legal regulation, and an eye toward heavier consideration of the minority or "outsider" perspective in the balancing of First Amendment values vs. the harms which need to be equally addressed. Professor Matsuda cites exhaustively to prior examples of a tradition of advocating stronger regulation of racist speech (see, e.g., Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," 17 Har.Civ.Rts. - Civ.Lib. L.Rev. 133 (1982); Kretzmer, "Free Speech and Racism," 8 Cardozo L.Rev. 445 (1987)).

On the other hand, the articles included by Professors Gerald Gunther, Chester E. Finn, Jr., and President Robert M. O'Neil argue for traditional adherence to First Amendment values and advocate against carving out further exceptions regarding campus speech and regulating harassment.

The issue from Synthesis of Law and Policy in Higher Education entitled "Freedom of Expression and Racial Harassment on Campus," edited by Gary Pavela, serves as a general treatment of the policy issues, including interviews with William Kaplin who addresses the perspective of private institutions, and Robert M. O'Neil.

The outline by Jane Brandt Bulbin entitled "Freedom of Expression Under the First Amendment and Racial Harassment on Campus" surveys first amendment case law and concludes with some practical guidelines for drafting a racial harassment policy. David S. Tatel's remarks from his presentation at the "Conference on the President's Role in Creating a Health Campus Racial and Ethnic Climate" contain a valuable perspective in suggesting an analytical approach which avoids or minimizes First Amendment controversy, beginning by focusing on what the university is trying to accomplish in its policy. Ms. Bulbin, Mr. Tatel, and Ms. Burch's "Bibliography: The First Amendment and Racial Harassment on Campus" is also included for your reference.

Finally, Section III of the compendium includes a paper by Lawrence White outlining "The Constitutional Status of Expressive Conduct After the Flag-Burning Decision," and a paper by Alison B. Marshall and Walter B. Connolly, Jr., addressing some of the other legal issues beyond the First Amendment, including university liability for racial harassment, as well as the impact of the Doe decision, entitled "Racial Harassment at Universities: Legal Issues to Consider When Developing and Implementing a Racial Harassment Policy."

Several commentators in this arena have suggested, consistent with Justice Holmes' "marketplace of ideas" concept, and Justice Brandeis' observation that the cure for bad speech is "more speech, not enforced silence," that education and outlet for bad ideas, not increased administrative regulation, is the answer to the problem of the escalation of racial harassment incidents. Although this is undoubtedly the path involving the least legal risk, the Editors hope that the materials included in this compendium will serve as the basis for at least an educated and careful consideration of whether to adopt a narrowly tailored approach or a more aggressive approach to regulating racial harassment on your campus, which may eventually create new First Amendment exceptions to redress the very real harms that racist hate speech can cause.

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I. THE UNIVERSITY OF MICHIGAN EXPERIENCE

BACKGROUND TO THE UNIVERSITY OF MICHIGAN POLICY DEVELOPMENT

By: Elsa Kircher Cole
General Counsel, University of Michigan

The sport of hunting, or riding to the hounds, has long been a popular leisure pastime in Europe. The object of a hunt is well known, to flush out the prey through use of a pack of hounds, surround it and then, depending upon how bloodthirsty the hunters, kill it. To incite the hounds to one side of the field or the other to set upon the prey, medieval German hunters would yell at the hounds, "hare, hare." Their hope was that the hounds, through their loud baying, would terrorize and confuse the prey so that it might be easily encircled and captured. From this sporting tradition comes the term "harassment," the focus of the University of Michigan's policy described and discussed in this section.

When I arrived at the University of Michigan in August 1989, it was to find a major legal challenge to the constitutionality of the University of Michigan's student discriminatory harassment policy. That policy had been adopted by the University's Board of Regents in April 1988 (see Section I.C, infra). Interim University President Robben Fleming wrote the original draft of the the policy in January 1988 in reaction to a series of racially discriminatory events that occurred on the Michigan campus in winter term 1987. These included racist flyers slipped under the doors of some black women students in a University residence hall and jokes with racial punch lines told over a campus radio broadcast.

President Fleming's original draft of the policy spoke of sanctioning remarks that "seriously offend" many individuals beyond the immediate victim and that detract from the necessary education climate on campus. Although those words were struck in subsequent drafts of the policy, they were significant for the negative impact they had upon the reviewing court.

The final draft of the policy adopted the idea of the Dean of the University of Michigan Law School, Lee Bollinger, of dividing the campus into three forums where different restrictions on speech would apply. This idea continues in the University of Michigan's interim student harassment policy (see Section I.E, infra).

One forum includes those areas of campus that have traditionally been considered public forums, such as the University's Diag or its Regents' Plaza. There the broadest range of speech can occur. The second forum is composed of the classroom and other academic centers, such as laboratories, where traditionally the teaching of the university has taken place. Here the policy said the university would discipline

> any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin ancestry, age, marital status, handicap or Vietnam-era veteran status AND THAT:

> involves an express or implied threat to an individual's academic efforts . . . or that has the purpose or reasonably foreseeable effect of interfering with such efforts . . ., or that creates an intimidating, hostile or demeaning environment for educational pursuits . . .

It was on this part of the policy that the court focused its attention. The last campus forum encompasses the residence hall areas of the University where a greater degree of freedom from harassment was asserted as it was argued that the courts have recognized that people can have an expectation of privacy in their own homes.

The University administration felt a need to give some guidance to the University community about how the new policy would be interpreted. It therefore promulgated a pamphlet of guidelines entitled "What Students Should Know About Discrimination and Discriminatory Harassment by Students in the University Environment" that it distributed to all University students in fall 1988 (see Section I.D, infra). The pamphlet stated in part,

> YOU are a harasser when . . . You tell jokes about gay men and lesbians. You laugh at and joke about someone in your class who stutters. Your student organization sponsors entertainment that includes a comedian who slurs Hispanics. You comment in a derogatory way about a particular person or group's physical appearance or sexual orientation, or their cultural origins, or religious beliefs.

In January 1989 that pamphlet was quietly withdrawn from circulation because of complaints that the pamphlet inaccurately categorized such examples as actionable harassment. The fact of this withdrawal was not widely made known to the general student body and therefore students considered the pamphlet still in effect.

In May 1989 the ACLU of Michigan, on behalf of an anonymous graduate student, brought suit against the University in the federal district court for the Eastern District of Michigan, a case entitled John Doe v. University of Michigan, challenging the constitutionality of the policy and the guidelines (see Section I.B, infra, for Judge Cohn's decision). The plaintiff student, who remained anonymous throughout the litigation, claimed he felt constrained by the policy and the guidelines from discussing in class some controversial ideas correlating intelligence to the physical characteristics of the sexes and certain races.

The University responded that the policy was never meant to reach such an academic exchange but was directed toward racial invectives and slurs of the type that are commonly known to tend to provoke violence by or injure the listener. The court rejected that defense, saying it was a revisionist interpretation of the policy. The court noted that President Fleming's original draft of the policy was directed toward offensive speech, as were the guidelines, and that speech that is merely offensive has constitutional protection. The court reminded the University that because freedom of speech is so protected in this country, any restriction to it must be drafted in the narrowest terms possible. The court then found the use of the terms "stigmatizing and victimizing" in the academic forum part of the policy overbroad and vague, that people of common intelligence would have to guess their meaning. The court therefore struck down as unconstitutional that portion of the policy which dealt with verbal conduct in the classroom setting and permanently enjoined the University from enforcing it.

Following this decision of the court at the end of August 1989, the University had three options: to appeal the district court decision to the Sixth Circuit Court of Appeals, to have no policy, or to draft a new one. When the University's Regents adopted the original policy they had included in it a sunset clause of December 1989. They did this in part to review the language of the policy to decide how effectively it was meeting problems on campus. Thus, the University had never wed itself to the particular language of the student harassment policy; it was recognized this was a new effort by the University and might well need modification or change. Because the original policy language was not the only one acceptable to the University, it chose not to appeal its unconstitutionality.

The second possibility, no policy at all, was not acceptable because without the policy there would be no campus regulations to deal with the most extreme types of racial harassment. In this the University of Michigan differed from most institutions of higher education as it did not have any general language in a student code to fall back on which spoke about respecting the rights and dignity of all persons on the campus. Therefore, the University's President, James Duderstadt, decided to go with the third alternative, a new policy, interim in nature, written narrowly to pass constitutional scrutiny, to allow time for a campus-wide, thoughtful consideration of what type of policy, if any, would be appropriate for the University in the future.

Because fall term 1989 was about to commence, I only had a short period of time to draft an interim policy. I chose therefore, to write one that reflected the current state of the law in the area of constitutionally permissible restraints on freedom of speech rather than one that would test the limits of existing law (see Section I.E, infra for the interim policy). Like the policies that several other colleges and universities, such as Stanford, the University of California and the University of Wisconsin, have adopted or are proposing to adopt, the interim policy follows the line of the U.S. Supreme Court cases, e.g. Chaplinsky v. New Hampshire, that allow sanctions for the utterance of "fighting words," that is, speech that occurs in a face-to-face confrontation involving discriminatory slurs toward a particular individual or group.

Not all colleges and universities are comfortable with that approach. A committee at the University of Texas has recently recommended rejection of the use of "fighting words" as the basis for its anti-harassment policy. That committee believes the Supreme Court is backing away from strongly enforcing that restriction on speech. It therefore recommends use of a different restriction on speech that the courts have allowed, speech that intentionally inflicts emotional distress.

The use of the tort of intentional infliction of emotional distress, or outrage as it is sometimes called, as the basis for a policy against racial harassment has certain advantages. There is a well-developed body of case law upon which to draw to analyze fact situations. The Second Restatement of Torts has defined already what constitutes "intent" and the level of severity that conduct must meet to be actionably outrageous.

The problem with going to an outrage standard to find actionable racial harassment is the same problem alleged victims of that tort find in court. Because the conduct must be so severe that no reasonable person could be expected to endure it, it is extremely difficult to find it has occurred. If the purpose of a harassment policy is to help end uncivil behavior on campus, such a standard may be too high to be ever of much utility as a restraining mechanism.

The University of Michigan did not go to that standard in its interim policy. However, the interim policy includes the element of intent in its definition of harassment; a racial epithet, slur or invective must be directed toward an individual with the purpose of injuring the person to whom the words are directed. Intent to injure is to be determined by examining all the surrounding facts and circumstances in each case. Words that are thoughtlessly or carelessly said are not actionable.

But should that be the case? Are racial epithets and slurs so harmful in themselves that a different approach should be taken by the University of Michigan? And is the University itself such a unique institution that courts should treat if differently or allow it more discretion to regulate speech?

Some administrators argue that the university should be a model of racial tolerance and civility for society. Others contend that the university seeks a particular environment for the nurturing and education of all of its student members and that behavior that is incompatible with this goal must be restricted. Administrators also assert that racial harassment undermines the public university's basic educational mission and substantially interferes with its ability to provide the academic environment necessary for a quality education. A further argument is that students living away from home for the first time are particularly vulnerable to misunderstanding the university's tolerance for racist speech as condoning it and carrying that message with them when they leave.

These arguments may be insufficient, however, to a court that is going to apply the highest compelling interest standard to a university to see if its restrictions on speech are justified. Justice Brennan's satirical dismissal of the University of Pennsylvania's arguments for special treatment in the recent Supreme Court case involving access to tenure peer review files by the EEOC should be sufficient to upset any complacency a university might have that a court will always defer automatically to its knowledge of how to regulate itself.

The problem is that many of the types of racism that colleges and universities are experiencing now are too subtle to be reached by policies that conform to the present state of the law. Everyone can agree that they want universities to be places where even the most heinous of ideas are allowed to be presented as long as that occurs in a time, place and manner where reasoned rebuttal can happen. Everyone can probably also agree that education is the best long term solution to discriminatory harassment. The true challenge lies in creating a short term solution that, without violating first amendment principles, will regulate speech that has as its only purpose hate or ridicule and that prevents those against whom it is directed from having an equal opportunity for an education.

The University of Michigan continues to be committed to trying to develop a mechanism that will allow that to occur. Students, staff and faculty committees have spent the months since the decision in Doe in examining the interim policy and suggesting changes and modifications as well as questioning the utility of a policy at all. It is hoped that with such community input that the University can develop some possible solutions to this difficult and troubling problem.

John DOE, Plaintiff,

v.

UNIVERSITY OF MICHIGAN, Defendant.

Civ. No. 89–71683.

United States District Court,
E.D. Michigan,
Southern Division.

Sept. 22, 1989.

Addendum Sept. 25, 1989.

Graduate student brought suit challenging the constitutionality of a university's policy on discrimination and discriminatory harassment of students. The District Court, Cohn, J., held that: (1) policy was overbroad, and (2) policy was so vague that its enforcement would violate the due process clause.

Order in accordance with opinion.

1. Constitutional Law 🔑42.1(1)

Psychology graduate student specializing in biopsychology, who alleged that his right to freely and openly enter into classroom discussion concerning controversial theories positing biologically based differences between sexes and races might be sanctionable under university's policy, had standing to challenge constitutionality of university policy on discrimination and discriminatory harassment of students.

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2. Constitutional Law ⇨42.1(3)

An individual has standing to challenge constitutionality of a penal statute if he or she can demonstrate a realistic and credible threat of enforcement; mere possibility that a person might be subject to sanctions of a statute is insufficient.

3. Constitutional Law ⇨42(2)

Threat of enforcement must be specific and direct and against a particular party in order to have standing to challenge constitutionality of a statute; however, it is not necessary that an individual first be exposed to prosecution in order to have standing to challenge a statute which is claimed to deter exercise of constitutional rights.

4. Colleges and Universities ⇨9.30(2)
Constitutional Law ⇨90.1(1.4)

University's policy on discrimination and discriminatory harassment of students, which prohibited "stigmatizing or victimizing" individuals or groups on basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, swept within its scope significant amount of "verbal conduct" which was protected speech under First Amendment, and therefore was overbroad both on its face and as applied. U.S.C.A. Const.Amend. 1.

5. Colleges and Universities ⇨9.30(1)
Constitutional Law ⇨278.5(5)

Terms of university's policy on discrimination and discriminatory harassment of students, which prohibited "stigmatizing or victimizing" individuals or groups on basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, were so vague that its enforcement would violate due process clause. U.S.C.A. Const.Amend. 14.

Robert A. Sedler, Paul J. Denenfeld, for plaintiff.

Dickinson, Wright, Moon, Van Dusen & Freeman by Henry W. Saad, Joseph C. Marshall, III, Robert Powell, Elizabeth M. Pezzetti, Bloomfield Hills, Mich., for defendant.

OPINION

COHN, District Judge.

> [T]aking stock of the legal system's own limitations, we must realize that judges, being human, will not only make mistakes but will sometimes succumb to the pressures exerted by the government to allow restraints [on speech] that ought not to be allowed. To guard against these possibilities we must give judges as little room to maneuver as possible and, again, extend the boundary of the realm of protected speech into the hinterlands of speech in order to minimize the potential harm from judicial miscalculation and misdeeds.
>
> L. Bollinger, *The Tolerant Society* 78 (1986).

I. INTRODUCTION

It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values. Recently, the University of Michigan at Ann Arbor (the University), a state-chartered university, *see* Mich. Const. art. VIII, adopted a Policy on Discrimination and Discriminatory Harassment of Students in the University Environment (the Policy) in an attempt to curb what the University's governing Board of Regents (Regents) viewed as a rising tide of racial intolerance and harassment on campus. The Policy prohibited individuals, under the penalty of sanctions, from "stigmatizing or victimizing" individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status. However laudable or appropriate an effort this may have been, the Court found that the Policy swept within its scope a significant amount of "verbal conduct" or "verbal behavior" which is unquestionably protected speech under the First Amendment. Accordingly, the Court granted plaintiff

John Doe's (Doe)[1] prayer for a permanent injunction as to those parts of the Policy restricting speech activity, but denied the injunction as to the Policy's regulation of physical conduct. The reasons follow.[2]

II. FACTS GENERALLY

According to the University, in the last three years incidents of racism and racial harassment appeared to become increasingly frequent at the University. For example, on January 27, 1987, unknown persons distributed a flier declaring "open season" on blacks, which it referred to as "saucer lips, porch monkeys, and jigaboos." On February 4, 1987, a student disc jockey at an on-campus radio station allowed racist jokes to be broadcast. At a demonstration protesting these incidents, a Ku Klux Klan uniform was displayed from a dormitory window. These events and others prompted the University's President on February 19, 1987 to issue a statement expressing outrage and reaffirming the University's commitment to maintaining a racially, ethnically, and culturally diverse campus. The University was unable to identify any of the perpetrators. It is unknown whether the culprits were students. Likewise, there was no evidence to suggest that these were anything other than isolated and purposeless acts.

On March 5, 1987, the Chairperson of the State House of Representatives Appropriations Subcommittee on Higher Education held a public hearing on the problem of racism at the University in Ann Arbor. Forty-eight speakers addressed the subcommittee and an audience of about 600. The speakers were uniformly critical of the University's response to racial incidents and accused it of generally ignoring the problems of minority students. At the close of the hearing, the Chairperson was quoted as stating

> Michigan legislators will not tolerate racism on the campus of a state institution ... Racism has no place in this day and age.... [The subcommittee] will make our decision [on appropriations for the University] during their budget discussions of the next few weeks.... Some things have to change. The committee members want to meet with [the University's President]. Holding up funds as a club may be part of our response, but that will predicate on how the university responds.

Following the hearing, the United Coalition Against Racism (UCAR), a campus anti-discrimination group, announced that it intended to file a class action civil rights suit against the University "for not maintaining or creating a non-racist, non-violent atmosphere" on campus. Following discussions with a national civil rights leader in March of 1987, the University adopted a six-point action plan to remedy the racial problems on campus. This included the adoption of "[a]n anti-racial harassment policy ... as a component of the University's rules and regulations with appropriate sanctions specified."

On September 22, 1987, the University's President issued a memorandum to the various schools of the University directing them to refer complaints of discriminatory harassment to the Affirmative Action Office in the Office of the President for monitoring and evaluation. An analysis of the complaints which were filed reflects that the University had neither independently verified the accuracy of the complaints nor identified a specific perpetrator for most of the incidents described. Likewise, there is no way by which it can be determined whether such incidents occur more frequently at the University than other comparable institutions.

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[1] Plaintiff proceeded under the pseudonym "John Doe" to preserve his privacy and protect himself from any adverse publicity arising from this case. The University did not contest plaintiff's right to proceed anonymously.

Doe was represented by counsel provided by the American Civil Liberties Union. His attorneys are to be commended for the consistently high quality of the representation they provided Doe in this case.

[2] The reasons for the Court's decision were stated on the record at a hearing held on August 25, 1989. At that time, the Court stated that it would issue a more detailed written opinion at a later date. To the extent that this opinion is at variance with the Court's August 25, 1989 bench opinion, it is the written opinion which controls. *See Schmidt v. Plains Electric Inc.*, 281 N.W.2d 794 (N.D.1979).

In December 1987, the University President resigned and a former University president was temporarily appointed to the post until a permanent successor was chosen. On December 14, 1987, the Acting President circulated a confidential memorandum to the University's executive officers detailing a proposal for an anti-discrimination disciplinary policy. The proposed policy prohibited "[h]arassment of anyone through word or deed or any other behavior which discriminates on the basis of inappropriate criteria." The Acting President recognized at the time that the proposed policy would engender serious First Amendment problems, but reasoned that

> just as an individual cannot shout "Fire!" in a crowded theater and then claim immunity from prosecution for causing a riot on the basis of exercising his rights of free speech, so a great many American universities have taken the position that students at a university cannot by speaking or writing discriminatory remarks which seriously offend many individuals beyond the immediate victim, and which, therefore detract from the necessary educational climate of a campus, claim immunity from a campus disciplinary proceeding. I believe that position to be valid.

The other "American universities" to which the President referred to were not identified at any time. Nor was any document presented to the Court in any form which "valid[ates]" this "position."

At the January 15, 1988 meeting of the Regents, the Acting President informed the Board that he been working on a proposed policy on student discipline dealing with racial harassment pursuant to his general authority under Regents' Bylaw 2.01.[3] He stated that he was taking this action in response to widespread complaints that the University could not or would not enforce its existing regulations concerning racial harassment. Adoption of a policy, he noted, "would enable the University to take the position that it was willing to do something about this issue."[4] The Acting President conceded that any proposed policy would implicate serious civil liberties questions, but he expressed a commitment to pursue the problem nevertheless.

Following the January meeting, the Acting President appointed the Director of the University Office of Affirmative Action (Director) to draft a policy. The proposed policy went through twelve drafts. Throughout this process, the Director consulted with a lawyer in the Office of University Counsel and perhaps several University of Michigan Law School professors.[5] On February 29, 1988, a proposed policy was published in the *University Record* and faculty, students, and staff were invited to comment. A public hearing on the proposed policy was held on March 16, 1988 at which numerous speakers commented and suggested various changes and refinements. The next day, the Acting President introduced the draft policy for consideration at the monthly Regents meeting. In the ensuing discussion, one Regent expressed concern that the policy would unduly restrict students' free speech rights. A second Regent criticized the policy on the grounds that it failed to address the problem of students heckling outside speakers who came to the campus. The Regents agreed that the final draft incorporating the suggested changes would be presented at the next meeting. University officers also promised that an interpretive guide with examples of sanctionable conduct would be issued as an authoritative guide for the benefit of the University community. At the April 14, 1988 Regents meeting, the Policy was unanimously adopted. It became effective on May 31, 1988 and was set to expire on December 31, 1989 unless reenacted.

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[3] Regents' By-law 2.01 provides that in addition to other duties and functions, the President of the University shall exercise such general powers as to

> general oversight of teaching and research programs; the libraries, museums, and other supporting services; the general welfare of the faculty and supporting staffs; the business and financial welfare of the University; and the maintenance of health, diligence, and order among the students.

[4] Regents' By-law 7.02, adopted in 1985, established the University Council, a formal body composed of faculty, students, and administrators, charged with the responsibility for drafting uniform regulations governing the conduct of members of the community. As of January, 1988, the University Council had failed to act. This was apparently the reason why the Regents bypassed the University Council in formulating the Policy.

[5] This equivocation is attributable to the fact that consultations with law professors were unaccompanied by the exchange of any formal correspondence or memoranda.

III. THE UNIVERSITY OF MICHIGAN POLICY ON DISCRIMINATION AND DISCRIMINATORY HARASSMENT

A. *The Terms of the Policy*

The Policy established a three-tiered system whereby the degree of regulation was dependent on the location of the conduct at issue. The broadest range of speech and dialogue was "tolerated" in variously described public parts of the campus. Only an act of physical violence or destruction of property was considered sanctionable in these settings. Publications sponsored by the University such as the *Michigan Daily* and the *Michigan Review* were not subject to regulation. The conduct of students living in University housing is primarily governed by the standard provisions of individual leases, however the Policy appeared to apply in this setting as well.[6] The Policy by its terms applied specifically to "[e]ducational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers[.]" In these areas, persons were subject to discipline for:

1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that

   a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

   b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

   c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation where such behavior:

   a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

   b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

   c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

On August 22, 1989, the University publicly announced, without prior notice to the Court or Doe, that it was withdrawing section 1(c) on the grounds that "a need exists for further explanation and clarification of [that section] of the policy." No reason was given why the analogous provision in paragraph 2(c) was allowed to stand.

The Policy by its terms recognizes that certain speech which might be considered in violation may not be sanctionable, stating: "The Office of the General Counsel will rule on any claim that conduct which is the subject of a formal hearing is constitutionally protected by the first amendment."

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[6] The constitutionality of the Policy as it relates to verbal conduct and verbal behavior in University housing is not raised in the complaint. The standard provisions of the University housing lease are not part of the record.

B. *Hearing Procedures*

Any member of the University community could initiate the process leading to sanctions by either filing a formal complaint with an appropriate University office or by seeking informal counseling with described University officials and support centers. The Policy states that it is the preference of the University to employ informal mechanisms for mediation and resolution of complaints whenever possible and in fact most complainants have chosen to proceed informally. University officers are authorized to act as mediators and employ educational sanctions, community service, disciplinary warnings, and restitution in attempting to reach a settlement acceptable to both the victim and the perpetrator. None of the records relating to enforcement of the Policy are to be included in a student's academic files, and the records so generated are to be maintained in accordance with applicable privacy laws.

Where a negotiated settlement proves impossible, a formal complaint would be filed with the Administrator of Complaints of Discriminatory Behavior in the Office of Vice-President of Student Services (Policy Administrator). The Policy Administrator would then undertake an independent investigation of the alleged incident to determine whether there is sufficient evidence of a violation to warrant the initiation of a formal hearing. If a hearing were necessary, a panel consisting of four students and one tenured faculty member would be convened to pass on the merits. The accused student would then be notified that a complaint had been filed against him or her, the specific charges, the identity of the complaining witness, and the facts of the complaint and investigation. At the hearing, the Policy Administrator would be responsible for presenting the charges against the accused student. Both the accused student and the complainant had the right to call and cross-examine witnesses and give testimony. The accused student had the right to have an attorney present at the hearing, but the attorney could not participate fully in the hearing unless suspension or expulsion were likely sanctions. If a majority of the hearing panel found by clear and convincing evidence that the Policy had been violated, they were to recommend an appropriate sanction. If the accused student was dissatisfied with the panel's decision, he or she had the right to have an appellate tribunal consisting of two students and the Vice-President for Student Services independently review the conviction and sanction.

C. *Sanctions*

The Policy provided for progressive discipline based on the severity of the violation. It stated that the University encouraged hearing panels to impose sanctions that include an educational element in order to sensitize the perpetrator to the harmfulness of his or her conduct. The Policy provided, however, that compulsory class attendance should not be imposed "in an attempt to change deeply held religious or moral convictions." Depending on the intent of the accused student, the effect of the conduct, and whether the accused student is a repeat offender, one or more of the following sanctions may be imposed: (1) formal reprimand; (2) community service; (3) class attendance; (4) restitution; (5) removal from University housing; (6) suspension from specific courses and activities; (7) suspension; (8) expulsion. The sanctions of suspension and expulsion could only be imposed for violent or dangerous acts, repeated offenses, or a willful failure to comply with a lesser sanction. The University President could set aside or lessen any sanction.

D. *Interpretive Guide*

Shortly after the promulgation of the policy in the fall of 1988, the University Office of Affirmative Action issued an interpretive guide (Guide) entitled ***What Students Should Know about Discrimination and Discriminatory Harassment by Students in the University Environment.*** The Guide purported to be an authoritative interpretation of the Policy and provided examples of sanctionable conduct. These included:

> A flyer containing racist threats distributed in a residence hall.
>
> Racist graffiti written on the door of an Asian student's study carrel.
>
> A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.
>
> Students in a residence hall have a floor party and invite everyone on their floor except one person because they think she might be a lesbian.
>
> A black student is confronted and racially insulted by two white students in a cafeteria.
>
> Male students leave pornographic pictures and jokes on the desk of a female graduate student.
>
> Two men demand that their roommate in the residence hall move out and be tested for AIDS.

In addition, the Guide contained a separate section entitled "You are a harasser when . . ." which contains the following examples of discriminatory conduct:

> You exclude someone from a study group because that person is of a different race, sex, or ethnic origin than you are.
>
> You tell jokes about gay men and lesbians.
>
> Your student organization sponsors entertainment that includes a comedian who slurs Hispanics.
>
> You display a confederate flag on the door of your room in the residence hall.
>
> You laugh at a joke about someone in your class who stutters.
>
> You make obscene telephone calls or send racist notes or computer messages.
>
> You comment in a derogatory way about a particular person or group's physical appearance or sexual orientation, or their cultural origins, or religious beliefs.

It was not clear whether each of these actions would subject a student to sanctions, although the title of the section suggests that they would. It was also unclear why these additional examples were listed separately from those in the section entitled "What is Discriminatory Harassment."

According to the University, the Guide was withdrawn at an unknown date in the winter of 1989, because "the information in it was not accurate." The withdrawal had not been announced publicly as of the date this case was filed.[7]

IV. STANDING

[1] Doe is a psychology graduate student. His specialty is the field of biopsychology, which he describes as the interdisciplinary study of the biological bases of individual differences in personality traits and mental abilities. Doe said that certain controversial theories positing biologically-based differences between sexes and races might be perceived as "sexist" and "racist" by some students, and he feared that discussion of such theories might be sanctionable under the Policy. He asserted that his right to freely and openly discuss these theories was impermissibly chilled, and he requested that the Policy be declared unconstitutional and enjoined on the grounds of vagueness and overbreadth.

The University in response questioned Doe's standing to challenge the Policy, saying that it has never been applied to sanction classroom discussion of legitimate ideas and that Doe did not demonstrate a credible threat of enforcement as to himself. The University also asserts that Doe could not base his claim on the free speech interests of unspecified third parties. These arguments served only to diminish the credibility of the University's argument on the merits because it appeared that it sought to avoid coming to grips with the constitutionality of the Policy.

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[7] The Policy was published in pamphlet form with a blue cover and a yellow slash down the center. The Guide was published in pamphlet form with the opposite color scheme. The University's colors are maize and blue. The graphic layout of the Policy and Guide pamphlets served to reinforce the Court's view that the two statements were integrally related. Indeed, at the hearing on August 25, 1989, the Court observed that the withdrawal of the Guide while retaining the Policy was like taking the maize out of the "maize and blue."

Article III of the Constitution limits the judicial power of federal courts to live cases and controversies. Traditionally, federal courts have interpreted this limitation to bar a party from maintaining a lawsuit unless the party had a sufficient stake in the outcome "as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 1703, 7 L.Ed.2d 663 (1962). To establish such an interest, a litigant must show that he or she has personally suffered some actual or threatened injury from the putatively illegal conduct of the defendant, that the injury could fairly be traced to the illegal conduct, and that it would be redressed by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). The challenged conduct must cause or threaten to cause a direct injury, *Laird v. Tatum*, 408 U.S. 1, 14, 92 S.Ct. 2318, 2326, 33 L.Ed.2d 154 (1972), which is distinct and palpable, *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). Doe clearly met this standard.

[2, 3] It is well settled that an individual has standing to challenge the constitutionality of a penal statute if he or she can demonstrate a realistic and credible threat of enforcement. *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). The mere possibility that a person might be subject to the sanctions of a statute is insufficient. *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C.Cir.1984). Rather, the threat of enforcement must be specific and direct and against a particular party. *Houston v. Hill*, 482 U.S. 451, 459 n. 7, 107 S.Ct. 2502, 2508 n. 7, 96 L.Ed.2d 398 (1987). It is not necessary, however, that an individual first be exposed to prosecution in order to have standing to challenge a statute which is claimed to deter the exercise of constitutional rights. *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973).

Were the Court to look only at the plain language of the Policy, it might have to agree with the University that Doe could not have realistically alleged a genuine and credible threat of enforcement. The Policy prohibited conduct which "stigmatizes or victimizes" students on the basis of "race, ethnicity, religion, sex, sexual orientation" and other invidious factors. However, the terms "stigmatize" and "victimize" are not self defining.[8] These words can only be understood with reference to some exogenous value system. What one individual might find victimizing or stigmatizing, another individual might not. Accordingly, the likelihood of a complaint being filed in response to Doe's anticipated classroom comments would be speculative at best. In addition, even if a complaint was filed, the Policy requires that considerations of freedom of speech and academic freedom be given due consideration by the Policy Administrator in determining whether a formal hearing is warranted. Even if a student were to find Doe's views victimizing or stigmatizing, the Policy Administrator might well conclude that his speech was protected by the First Amendment and refuse to take any action. Thus, if the plain language of the policy were all the Court had before it, it would probably conclude that Doe had failed to demonstrate a reasonable probability that the Policy would be construed to cover his anticipated speech.

The slate was not so clean, however. The Court had before it not only the terms of the Policy, but also its legislative history, the Guide, and experiences gleaned from a year of enforcement. The record clearly shows that there existed a realistic and credible threat that Doe could be sanctioned were he to discuss certain biopsychological theories.

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[8] "Stigmatize" is defined in *The American Heritage Dictionary* 1266 (1978) as "1. To characterize or brand as disgraceful or ignominious mark with stigma or brand. 2. To brand or mark with a stigma or stigmata. 3. To cause stigmata to appear on." "Victimize" is defined as "1. To subject to swindle or fraud; to cause discomfort or suffering to. 2. To make a victim of as if by slaying." *Id.* at 1428.

The legislative history demonstrated that the Policy was originally conceived as a remedy for racially insensitive and derogatory remarks which students found offensive. The Acting President's December 14, 1987 memorandum to the University's Executive Officers stated that the proposed anti-harassment policy would sanction any "remarks which seriously offend many individuals beyond the immediate victim, and which, therefore detract from the necessary educational climate of a campus." The University pointed out that the December 14 Memorandum was simply a tentative starting point for discussion and the Policy went though numerous drafts before it reached its final form. This may have well been so. However, the Memorandum nevertheless illustrated the *intent*, never subsequently contradicted, underlying the Policy and the University's general approach to the problems it perceived. Nothing in the legislative materials filed with the Court suggested that the Acting President's theoretical approach was substantially altered as the Policy developed. On the contrary, as late as February 2, 1988, the University attorney who researched the law and assisted in the drafting of the Policy, wrote a memorandum in which he conceded that merely offensive speech was constitutionally protected, but declared that

> [w]e cannot be frustrated by the reluctance of the courts and the common law to recognize the personal damage that is caused by discriminatory speech, nor should our policy attempt to conform to traditional methods of identifying harmful speech. Rather the University should identify and prohibit that speech that causes damage to individuals within the community.

The record before the Court thus indicated that the drafters of the policy intended that speech need only be offensive to be sanctionable.

The Guide also suggested that the kinds of ideas Doe wished to discuss would be sanctionable. The Guide was the University's authoritative interpretation of the Policy. It explicitly stated that an example of sanctionable conduct would include:

> A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.

Doe said in an affidavit that he would like to discuss questions relating to sex and race differences in his capacity as a teaching assistant in Psychology 430, Comparative Animal Behavior. He went on to say:

> An appropriate topic for discussion in the discussion groups is sexual differences between male and female mammals, including humans. [One] ... hypothesis regarding sex differences in mental abilities is that men as a group do better than women in some spatially related mental tasks partly because of a biological difference. This may partly explain, for example, why many more men than women chose to enter the engineering profession.

Doe also said that some students and teachers regarded such theories as "sexist" and he feared that he might be charged with a violation of the Policy if he were to discuss them. In light of the statements in the Guide, such fears could not be dismissed as speculative and conjectural. The ideas discussed in Doe's field of study bear sufficient similarity to ideas denounced as "harassing" in the Guide to constitute a realistic and specific threat of prosecution.

The University argued that it had withdrawn the Guide on the grounds that it contained some "inaccuracies." However, at best, this decision was conveyed only to department heads and other responsible officials and, as noted, had not been announced to the general University community at the time this lawsuit was filed. For the purposes of determining Doe's standing, the University's action came too late to render Doe's fear of enforcement illusory. *See United States v. W.T. Grant & Co.*, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953).

Finally, the record of the University's enforcement of the Policy over the past year suggested that students in the classroom and research setting who offended others by discussing ideas deemed controversial could be and were subject to discipline. A review of the University's discriminatory harassment complaint files suggested that on at least three separate occasions, students were disciplined or threatened with discipline for comments made in a classroom setting. These are discipline files 88-12-21, 88-9-05, and 88-9-07, discussed *infra*. At least one student was subject to a formal hearing because he stated in the context of a social work research class that he believed that homosexuality was a disease that could be psychologically treated. As will be discussed below, the Policy was enforced so broadly and indiscriminately, that plaintiff's fears of prosecution were entirely reasonable. Accordingly, the Court found that Doe had standing to challenge the policy.[9]

V. VAGUENESS AND OVERBREADTH

Doe initially moved for a preliminary injunction against the Policy on the grounds that it was unconstitutionally vague and overbroad and that it chilled speech and conduct protected by the First Amendment. The University in response said that the Policy has never been applied to reach protected speech and a preliminary injunction should therefore be denied. At the August 25, 1989 hearing on Doe's motion, the Court, without objection, consolidated the hearing on the motion with the trial on the merits pursuant to Fed.R.Civ.P. 65(a)(2).[10] This obviated the need to consider whether Doe had made the requisite showing to warrant the issuance of a preliminary injunction. *See Mason County Medical Association v. Knebel*, 563 F.2d 256 (6th Cir. 1977).

A. *Scope of Permissible Regulation*

Before inquiring whether the policy is impermissibly vague and overbroad, it would be helpful to first distinguish between verbal conduct and verbal acts that are generally protected by the First Amendment and those that are not. It is the latter class of behavior that the University may legitimately regulate.

Although the line is sometimes difficult to draw with precision, the Court must distinguish at the outset between the First Amendment protection of so-called "pure speech" and mere conduct. *See* L. Tribe, *Constitutional Law* sec. 12-7 (2d Ed.1988). As to the latter, it can be safely said that most extreme and blatant forms of discriminatory conduct are not protected by the First Amendment, and indeed are punishable by a variety of state and federal criminal laws and subject to civil actions. Discrimination in employment, education, and government benefits on the basis of race, sex, ethnicity, and religion are prohibited by the constitution and both state and federal statutes.[11] *See, e.g.*, U.S. Const. amends. V, XIV; Mich Const. art. I, sec. 2; 42 U.S.C. sec. 2000e-16 (employment); Mich.Stat.Ann. sec. 3.548(202) [M.C.L.A. sec. 37.2202] (employment); 42 U.S.C. sec. 2000c (education); Mich. Const. art. VIII, sec. 2 (education); 42 U.S.C. sec. 2000d

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[9] In view of the fact that there was a substantial probability that the Policy might be enforced against Doe, there was no need to consider whether he has standing to assert the rights of third parties, *see, e.g., Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953), or whether the mere existence of the Policy has sufficiently "chilled" the intellectual atmosphere of the University as to make out a concrete injury-in-fact, *see, e.g., Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

[10] The University reserved the right to supplement the record to clarify any disputed factual issues, which it subsequently did. Doe chose not to respond. Nothing in the University's clarification papers materially changed any of the facts the Court relied upon in reaching its decision.

[11] There are no federal statutory or constitutional provisions against discrimination on the basis of sexual orientation or Vietnam Veteran status. *See Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). This hiatus does not mean that the University may not adopt regulations more protective than existing law, provided, of course, such regulation does not otherwise offend the state or federal constitutions.

(government benefits). In addition, the state provides criminal penalties and civil remedies for assault and battery, Mich. Stat.Ann. secs. 28.276–28.278 [M.C.L.A. secs. 750.81–750.83]; Mich.Stat.Ann. sec. 28.344(2) [M.C.L.A. sec. 750.1476] (physical assault for purposes of ethnic intimidation).[12] *Tinkler v. Richter*, 295 Mich. 396, 295 N.W. 201 (1940) (civil action for assault and battery), and vandalism and property damage, Mich.Stat.Ann. 28.609(1) [M.C.L.A. sec. 750.377a]; Mich.Stat.Ann. sec. 28.344(2) [M.C.L.A. sec. 750.1476] (property damage and destruction for purposes of ethnic intimidation); *Thoma v. Tracy Motor Sales*, 360 Mich. 434, 104 N.W.2d 360 (1960) (civil action for property destruction). Federal law imposes civil and criminal sanctions against persons depriving or conspiring to deprive others of rights guaranteed by the United States constitution. 42 U.S.C. secs. 1983, 1985 (civil); 18 U.S.C. secs. 241–242 (criminal).

Many forms of sexually abusive and harassing conduct are also sanctionable. These would include abduction, Mich.Stat. Ann. secs. 28.201–28.202 [M.C.L.A. secs. 750.11–750.12], rape, and other forms of criminal sexual conduct, Mich.Stat.Ann. sec. 28.788; *Totten v. Totten*, 172 Mich. 565, 138 N.W. 257 (1912) (civil action for rape). The dissemination of legally obscene materials is also a crime under state law. Mich.Stat.Ann. sec. 28.579 [M.C.L.A. sec. 750.347]. In addition, a civil remedy exists for women who are subjected to demands for sexual favors by employers as an express or implied *quid pro quo* for employment benefits. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Minorities or women who are exposed to such extreme and pervasive workplace harassment as to create a hostile or offensive working environment are also entitled to civil damages. *Id.* (and cases cited therein). The First Amendment presents no obstacle to the establishment of internal University sanctions as to any of these categories of conduct, over and above any remedies already supplied by state or federal law.

While the University's power to regulate so-called pure speech is far more limited, *see United States v. O'Brien*, 391 U.S. 367, 376–77, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), certain categories can be generally described as unprotected by the First Amendment. It is clear that so-called "fighting words" are not entitled to First Amendment protection. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). These would include "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words'—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572, 62 S.Ct. at 769. Under certain circumstances racial and ethnic epithets, slurs, and insults might fall within this description and could constitutionally be prohibited by the University. In addition, such speech may also be sufficient to state a claim for common law intentional infliction of emotional distress. *Ledsinger v. Burmeister*, 114 Mich. App. 12, 18–19, 318 N.W.2d 558 (1982). Credible threats of violence or property damage made with the specific intent to harass or intimidate the victim because of his race, sex, religion, or national origin is punishable both criminally and civilly under state law. Mich.Stat.Ann. sec. 28.344(2) [M.C.L.A. sec. 750.1476]. Similarly, speech which has the effect of inciting imminent lawless action and which is likely to incite such action may also be lawfully punished.

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[12] Recently, the Michigan legislature enacted a law making it a criminal offense to commit an act of "ethnic intimidation," which is defined as the causing of physical contact with another, the damaging of real or personal property, or making a credible threat to do so with the specific intent to "intimidate or harass another person because of that person's race, color, religion, gender, or national origin[.]" Mich.Stat.Ann. sec. 28.344(2) [M.C.L.A. sec. 750.1476]. The statute prescribes a maximum penalty of not more than two years imprisonment or $5,000 fine or both. It also establishes a civil remedy for such conduct entitling a successful plaintiff to treble damages or $2,000, whichever is greater, and attorney's fees.

For a survey of similar anti-hate crime legislation in other states, *see* Anti-Defamation League, *Hate Crimes Statutes: A Response to Anti-Semitism, Vandalism, and Violent Bigotry* (1988).

Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). Civil damages are available for speech which creates a hostile or abusive working environment on the basis of race or sex. *Meritor, supra.* Legally obscene speech is unprotected by the First Amendment, *Miller v. California*, 413 U.S. 15, 22, 93 S.Ct. 2607, 2613, 37 L.Ed.2d 419 (1973), as are materials involving the sexual exploitation of children. *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Similarly, speech which is "vulgar," "offensive," and "shocking" is not entitled to absolute constitutional protection in all circumstances. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986); *FCC v. Pacifica Foundation, supra.* Certain kinds of libel and slander are also not protected. *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), including possibly group libel, *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952). Finally, the University may subject all speech and conduct to reasonable and nondiscriminatory time, place, and manner restrictions which are narrowly tailored and which leave open ample alternative means of communication. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981). If the Policy had the effect of only regulating in these areas, it is unlikely that any constitutional problem would have arisen.

What the University could not do, however, was establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed. *Texas v. Johnson*, — U.S. —, —, 109 S.Ct. 2533, 105 L.Ed.2d 342, 360 (1989); *Chicago Police Department v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2289–90, 33 L.Ed.2d 212 (1972); *Cohen v. California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787, 29 L.Ed.2d 284 (1971); *NAACP v. Button*, 371 U.S. 415, 445, 83 S.Ct. 328, 852, 9 L.Ed.2d 405 (1963); *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949). As the Supreme Court stated in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943):

> If there is any star fixed in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people. *Texas v. Johnson, supra*, — U.S. at —, 109 S.Ct. at 2544–45, 105 L.Ed.2d at 360; *Hustler Magazine v. Falwell*, 485 U.S. 46, 55–56, 108 S.Ct. 876, 882, 99 L.Ed.2d 41 (1988); *City Counsel of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984); *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 745–46, 98 S.Ct. 3026, 3038–39, 57 L.Ed.2d 1073 (1978); *Collin v. Smith*, 578 F.2d 1197, 1205–07 (7th Cir.), *cert. denied* 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978). As the Supreme Court noted in *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 1365, 22 L.Ed.2d 572 (1969):

> It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. *See e.g. Cox v. Louisiana (I)*, [379 U.S. 536 [85 S.Ct. 453, 13 L.Ed.2d 471] (1965)]; *Edwards v. South Carolina*, [372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963)]; *Terminiello v. Chicago*, [337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949)]; *cf. Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

These principles acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission. *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203, 1211–12, 1 L.Ed.2d 1311 (1957). With these general rules in mind, the Court can now consider whether the Policy sweeps within its scope speech which is otherwise protected by the First Amendment.

B. *Overbreadth*

1.

[4] Doe claimed that the Policy was invalid because it was facially overbroad. It is fundamental that statutes regulating First Amendment activities must be narrowly drawn to address only the specific evil at hand. *Broadrick v. Oklahoma*, 413 U.S. 601, 611, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button, supra* 371 U.S. at 433, 83 S.Ct. at 845–46. A law regulating speech will be deemed overbroad if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate. *Id.* 413 U.S. at 612, 93 S.Ct. at 2915; *Houston v. Hill*, 482 U.S. 451, 458–60, 107 S.Ct. 2502, 2507–08, 96 L.Ed.2d 398 (1985); *Kolender v. Lawson*, 461 U.S. 352, 359 n. 8, 103 S.Ct. 1855, 1859 n. 8, 75 L.Ed.2d 903 (1983); *Gooding v. Wilson*, 405 U.S. 518, 521–22, 92 S.Ct. 1103, 1105–06, 31 L.Ed.2d 408 (1972).

The Supreme Court has consistently held that statutes punishing speech or conduct solely on the grounds that they are unseemly or offensive are unconstitutionally overbroad. In *Houston v. Hill, supra*, the Supreme Court struck down a City of Houston ordinance which provided that "[i]t shall be unlawful for any person to assault or strike or in any manner oppose, molest, and abuse or interrupt any policeman in the execution of his duty." The Supreme Court also found that the ordinance was overbroad because it forbade citizens from criticizing and insulting police officers, although such conduct was constitutionally protected. *Id.* 482 U.S. at 460–65, 107 S.Ct. at 2508–10. The fact that the statute also had a legitimate scope of application in prohibiting conduct which was clearly unprotected by the First Amendment was not enough to save it. In *Gooding v. Wilson, supra*, the Supreme Court struck down a Georgia statute which made it a misdemeanor for "[a]ny person [to], without provocation, use to or of another, and in his presence ... opprobrious words or abusive language, tending to cause a breach of the peace." The Supreme Court found that this statute was overbroad as well, because it punished speech which did not rise to the level of "fighting words," as defined in *Chaplinsky v. New Hampshire, supra*. The Supreme Court struck down a similar ordinance in *Lewis v. New Orleans*, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974), on the same grounds. In *Papish v. University of Missouri*, 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973), the Supreme Court ordered the reinstatement of a university student expelled for distributing an underground newspaper sporting the headline "Motherfucker acquitted" on the grounds that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of conventions of decency." *Id.* at 670, 93 S.Ct. at 1199. Although the Supreme Court acknowledged that reasonable restrictions on the time, place, and manner of distribution might have been permissible, "the opinions below show clearly that [plaintiff] was dismissed because of the disapproved *content* of the newspaper." *Id.* Most recently, in *Texas v. Johnson, supra*, the Supreme Court invalidated a Texas statute prohibiting burning of the American flag on the grounds that there was no showing that the prohibited conduct was likely to incite a breach of the peace. These cases stand generally for the proposition that the state may not prohibit broad classes of speech, some of which may indeed be legitimately regulable, if in so doing a substantial amount of constitutionally protected conduct is also prohibited. This was the fundamental infirmity of the Policy.

2.

The University repeatedly argued that the Policy did not apply to speech that is protected by the First Amendment. It urged the Court to disregard the Guide as "inaccurate" and look instead to "the manner in which the Policy has been interpreted and applied by those charged with its enforcement." However, as applied by the University over the past year, the Policy was consistently applied to reach protected speech.

On December 7, 1988, a complaint was filed against a graduate student in the School of Social Work alleging that he harassed students based on sexual orientation and sex. The basis for the sexual orientation charge was apparently that in a research class, the student openly stated his belief that homosexuality was a disease and that he intended to develop a counseling plan for changing gay clients to straight. *See* Discipline File 88-12-21, described *supra.* He also related to other students that he had been counseling several of his gay patients accordingly. The student apparently had several heated discussions with his classmates over the validity and morality of his theory and program. On January 11, 1989, the Interim Policy Administrator wrote to the student informing him that following an investigation of the complaints, there was sufficient evidence to warrant a formal hearing on the charges of sex and sexual orientation harassment.[13] A formal hearing on the charges was held on January 28, 1989. The hearing panel unanimously found that the student was guilty of sexual harassment but refused to convict him of harassment on the basis of sexual orientation. The panel stated:

> In a divided decision the hearing panel finds that the evidence available to the panel indicates that .... did not harass students on the basis of sexual orientation under the strict definition of "The University of Michigan Policy on Discrimination and Discriminatory Harassment by Students in the University Environment." In accordance with First Amendment rights to free speech and the University's policy of academic freedom, ... did not violate the policy by discussing either the origins or "curability" of homosexuality in the School of Social Work.

Although the student was not sanctioned over the allegations of sexual orientation harassment, the fact remains that the Policy Administrator—the authoritative voice of the University on these matters—saw no First Amendment problem in forcing the student to a hearing to answer for allegedly harassing statements made in the course of academic discussion and research. Moreover, there is no indication that had the hearing panel convicted rather than acquitted the student, the University would have interceded to protect the interests of academic freedom and freedom of speech.

A second case, which was informally resolved, also demonstrated that the University did not exempt statements made in the course of classroom academic discussions from the sanctions of the policy. On September 28, 1988, a complaint was filed against a student in an entrepreneurship class in the School of Business Administration for reading an allegedly homophobic limerick during a scheduled class public-speaking exercise which ridiculed a well known athlete for his presumed sexual orientation. Complaint No. 88-9-05. The Policy Administrator was able to persuade the perpetrator to attend an educational "gay rap" session, write a letter of apology to the *Michigan Daily*, and apologize to his class and the matter was dropped. No discussion of the possibility that the limerick was protected speech appears in the file or in the Administrator's notes.

A third incident involved a comment made in the orientation session of a preclinical dentistry class. The class was widely regarded as one of the most difficult for second year dentistry students. To allay fears and concerns at the outset, the class was broken up into small sections to informally discuss anticipated problems. During the ensuing discussion, a student stated that "he had heard that minorities had a difficult time in the course and that he had heard that they were not treated fairly." Complaint No. 88-9-07. A minority professor teaching the class filed a complaint on the grounds that the comment was unfair and hurt her chances for tenure. Following the filing of the complaint, the student was "counseled" about the existence of the policy and agreed to write a letter apologizing for making the comment without adequately verifying the allegation, which he said he had heard from his roommate, a black former dentistry student.[14]

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[13] The letter stated in part:

> One type of complaint alleges that you have engaged in discrimination and/or discriminatory harassment on the basis of sexual orientation. Specifically the complaints allege the following:
>
> 1. You have made harassing statements in class and in classroom buildings to other students and/or faculty that are intimidating, hostile, and demeaning on the basis of sexual orientation. Specifically .... complains that you have stated repeatedly that homosexuality is an illness that needs to be "cured".
>
> 2. You have made several anti-gay comments to other students, specifically to .... stating that homosexuality is abnormal and unnatural.

Although the Policy required identification of the complainants, these names were withheld from the Court to protect their privacy.

The manner in which these three complaints were handled demonstrated that the University considered serious comments made in the context of classroom discussion to be sanctionable under the Policy. The innocent intent of the speaker was apparently immaterial to whether a complaint would be pursued. Moreover, the Administrator generally failed to consider whether a comment was protected by the First Amendment before informing the accused student that a complaint had been filed. The Administrator instead attempted to persuade the accused student to accept "voluntary" sanctions. Behind this persuasion was, of course, the subtle threat that failure to accept such sanctions might result in a formal hearing. There is no evidence in the record that the Administrator ever declined to pursue a complaint through attempted mediation because the alleged harassing conduct was protected by the First Amendment. Nor is there evidence that the Administrator ever informed an accused harasser during mediation negotiations that the complained of conduct might be protected. The Administrator's manner of enforcing the Policy was constitutionally indistinguishable from a full blown prosecution. The University could not seriously argue that the policy was never interpreted to reach protected conduct. It is clear that the policy was overbroad both on its face and as applied.[15]

C. *Vagueness*

Doe also urges that the policy be struck down on the grounds that it is impermissibly vague. A statute is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning." *Broadrick, supra* 413 U.S. at 607, 93 S.Ct. at 2913. A statute must give adequate warning of the conduct which is to be prohibited and must set out explicit standards for those who apply it. *Id.* "No one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). These considerations apply with particular force where the challenged statute acts to inhibit freedoms affirmatively protected by the constitution. *Smith v. Goguen,* 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974). However, the chilling effect caused by an overly vague statute must be both real and substantial, *Young v. American Mini-Theatres,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and a narrowing construction must be unavailable before a court will set it aside, *Screws v. United States*, 325 U.S. 91, 98, 65 S.Ct. 1031, 1033, 89 L.Ed. 1495 (1945).

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[14] Only a single complaint involving allegedly harassing remarks made in the context of a classroom discussion was dismissed because of First Amendment concerns. A complaint of anti-semitic harassment was filed on March 27, 1989, by a Jewish student in a class on the Holocaust who was offended by another student's suggestion that Jews cynically used the Holocaust to justify Israel's policies toward the Palestinians. Complaint No. 89-3-2. Accordingly to the Administrator's notes, the perpetrator refused to apologize for the comment. The Administrator phoned the complainant and informed her that the comment was protected speech, not covered by the policy.

[15] The Court's finding that the University interpreted the Policy to reach constitutionally protected speech makes it unnecessary to consider whether the Policy was susceptible to a saving construction. *See Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 493-503, 105 S.Ct. 2794, 2796-2801, 86 L.Ed.2d 394 (1985).

[5] Looking at the plain language of the Policy, it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct. The structure of the Policy was in two parts; one relates to cause and the other to effect. Both cause and effect must be present to state a prima facie violation of the Policy. The operative words in the cause section required that language must "stigmatize" or "victimize" an individual. However, both of these terms are general and elude precise definition. Moreover, it is clear that the fact that a statement may victimize or stigmatize an individual does not, in and of itself, strip it of protection under the accepted First Amendment tests.

The first of the "effects clauses" stated that in order to be sanctionable, the stigmatizing and victimizing statements had to "involve an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extracurricular activities or personal safety." It is not clear what kind of conduct would constitute a "threat" to an individual's academic efforts. It might refer to an unspecified threat of future retaliation by the speaker. Or it might equally plausibly refer to the threat to a victim's academic success because the stigmatizing and victimizing speech is so inherently distracting. Certainly the former would be unprotected speech. However, it is not clear whether the latter would.

Moving to the second "effect clause," a stigmatizing or victimizing comment is sanctionable if it has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, etc. Again, the question is what conduct will be held to "interfere" with an individual's academic efforts. The language of the policy alone gives no inherent guidance. The one interpretive resource the University provided was withdrawn as "inaccurate," an implicit admission that even the University itself was unsure of the precise scope and meaning of the Policy.

During the oral argument, the Court asked the University's counsel how he would distinguish between speech which was merely offensive, which he conceded was protected, and speech which "stigmatizes or victimizes" on the basis of an invidious factor. Counsel replied "very carefully." The response, while refreshingly candid, illustrated the plain fact that the University never articulated any principled way to distinguish sanctionable from protected speech. Students of common understanding were necessarily forced to guess at whether a comment about a controversial issue would later be found to be sanctionable under the Policy. The terms of the Policy were so vague that its enforcement would violate the due process clause. *See Cramp v. Board of Public Instruction*, 368 U.S. 278, 285–88, 82 S.Ct. 275, 279–281, 7 L.Ed.2d 285 (1961).

VI. CONCLUSION.

A.

The foregoing constitutes the Court's findings of fact and conclusions of law. Fed.R.Civ.P. 52. However, at this juncture, a few additional observations of a general nature would seem to be in order. As the Court noted at the hearing on August 25, 1989, there is nothing in the record to suggest that the University looked at the experience of any other university in developing its approach to the problem of discriminatory harassment. Had it done so, it might have discovered that Yale University, a private institution not subject to the strictures of the First Amendment, faced a similar dilemma pitting its efforts to promote equality against its commitment to free speech. In 1986, a sophomore at Yale was put on probation for two years by a University discipline board for disseminating a malicious flier intended to ridicule the homosexual community. The board eventually reversed the sanction, but only after a second hearing was held at which the student was represented by historian C. Vann Woodward, author of the University's 1975 report on free speech. N.Y.

Times, Oct. 15, 1986, at A27. That report concluded that "freedom of expression is a paramount value, more important than civility or rationality." N.Y. Times, Sept. 22, 1986, at B4. Writing about the case, Professor Woodward observed:

> It simply seems unnatural to make a fuss about the rights of a speaker who offends the moral or political convictions passionately held by a majority. The far more natural impulse is to stop the nonsense, shut it up, punish it—anything but defend it. But to give rein to that inclination would be to make the majority the arbiters of truth for all. Furthermore, it would put the universities into the business of censorship.

New York Times, Oct. 15, 1986, at A27.

While the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech. Unfortunately, this was precisely what the University did. From the Acting President's December 14 memorandum forward to the adoption of the Policy and continuing through the August 25 hearing, there is no evidence in the record that any officials at the University ever seriously attempted to reconcile their efforts to combat discrimination with the requirements of the First Amendment. The apparent willingness to dilute the values of free speech is ironic in light of the University's previous statements of policy on this matter. In 1977, the Regents adopted the "Statement on Freedom of Speech and Artistic Expression: The Rights and Obligations of Speakers, Performers, Audience Members, and Protesters at the University of Michigan" (Statement) which "reaffirm[ed] formally [the University's] deep and lasting commitment to freedom of speech and artistic expression." The Statement provides in part that

> freedom of speech must not ordinarily be restricted, governed or curtailed in any way by content except where the law, as interpreted by the Supreme Court of Michigan or the Supreme Court of the United States, holds that such an expression does not fall within constitutionally protected free speech. In all instances, the University authorities should act with maximum constraint, even in the face of obvious bad taste or provocation. The belief that some opinion is pernicious, false, or in any other way detestable cannot be grounds for its suppression.[16]

Needless to say, the philosophy expressed in the Statement is diametrically opposed to that reflected in the Acting President's December 14 Memorandum. Apparently, no one involved in the drafting process noted the apparent inconsistency with the Regents' views as expressed in the Statement.

Throughout the case, the University's counsel strenuously urged that First Amendment concerns held a top priority in the development and administration of the Policy. Counsel repeatedly argued that the University interpreted the Policy to reach conduct such as racial slurs and epithets in the classroom directed at an individual victim. However, as the Court observed in its August 25, 1989 bench opinion,

> what we have heard here this morning ... from University counsel is a revisionist view of the Policy on Discrimination and Discriminatory Harassment by Students in the University Environment, and it is a view and interpretation of the Policy that was not in the minds of the legislators when it was adopted. And there is nothing in the record that has been presented to the Court which suggests that this was an appropriate interpretation of the policy.

Not only has the administrative enforcement of the Policy been wholly inconsistent with counsel's interpretation, but withdrawal of the Guide, *see supra* at 13, and the eleventh hour suspension of section 1(c), *see supra* at 8, suggests that the University had no idea what the limits of the Policy were and it was essentially making up the rules as it went along.

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[16] The Statement was redrafted by the University's Civil Liberties Board in 1988. The new Statement, substantially identical to the old, was formally re-enacted by the Regents at their July 1988 meeting.

B.

In his famous treatise on constitutional law, Thomas Cooley, Justice of the Michigan Supreme Court and Professor of Law at the University's Law School, came out as an early and forceful proponent of an expansive interpretation of the First Amendment. He reasoned that even if speech

> exceed[s] all the proper bounds of moderation, the consolation must be that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion.

T. Cooley, *A Treatise on the Constitutional Limitations* 429 (Da Capo ed. 1972) (1st ed. 1868). This observation appears as compelling today as when it was first written over one hundred and twenty years ago.

ADDENDUM

Inexplicably the Court did not become aware of a conference on legal story telling at the University's Law School in April 1989 until after its Opinion was docketed. Important for consideration of a broader perspective of the issues put by the Policy and the Court's holding of unconstitutionality under the First Amendment is a paper delivered at the conference by Mari J. Matsuda, an associate professor of law at the William S. Richardson School of Law at the University of Hawaii: *Public Response To Racist Speech: Considering the Victim's Story*, 87 Mich.L.Rev. 2320, August 1989.* Professor Matsuda's description of her purpose amply describes the significance of the paper:

> This Article attempts to begin a conversation about the first amendment that acknowledges both the civil libertarian's fear of tyranny and the victims' experience of loss of liberty in a society that tolerates racist speech. It suggests criminalization of a narrow, explicitly defined class of racist hate speech, to provide public redress for the most serious harm, while leaving many forms of racist speech to private remedies.... This is not an easy legal or moral puzzle, but it is precisely in these places where we feel conflicting tugs at heart and mind that we have the most work to do and the most knowledge to gain.

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* The Opinion was signed and filed around noon on September 22, 1989. The August 1989 issue of the Law Review, while delivered by mail to chambers that morning, was not first read by

DISCRIMINATION and DISCRIMINATORY HARASSMENT by STUDENTS IN THE UNIVERSITY ENVIRONMENT

PREAMBLE

Discrimination, as defined in Regental Bylaw 14.06 and a Presidential Policy Statement issued in March, 1984, is unacceptable on University of Michigan campuses. Such behavior threatens to destroy the environment of tolerance and mutual respect which must prevail if a university is to fulfill its purpose.

Having proclaimed the unacceptability of discriminatory conduct, the University now provides the machinery for the enforcement of the above rules on the Ann Arbor campus. In doing so, it protects the freedom of speech guaranteed by the first amendment to the United States Constitution while at the same time deterring discriminatory conduct which goes beyond the legally defined boundaries of free speech. This it does in fulfillment of its duty to protect the educational environment of the University.

Because there is tension between freedom of speech, the right of individuals to be free from injury caused by discrimination, and the University's duty to protect the educational process, the enforcement procedures assume that it may be necessary to have varying standards depending upon the locus of the regulated conduct. Thus a distinction is drawn among public forums, educational and academic centers and housing units.

In dedicated public forums, such as the Diag and Regents' Plaza, as well as mass media such as the *Michigan Review* and the *Michigan Daily*, individuals are entitled to engage in the most wide-ranging freedom of speech.

In academic and educational centers where the University's educational mission is focused, such as classroom buildings, libraries, recreation or study centers, discriminatory conduct which materially impedes the educational process is an object of concern and may be proscribed.

In University Housing, persons should not be required to tolerate discriminatory behavior in their homes. Therefore, the behavioral standards and obligations residents agree to abide by under their leases will govern discriminatory conduct which occurs in University Housing.

PROHIBITED DISCRIMINATION AND DISCRIMINATORY HARASSMENT

A

Discrimination and discriminatory harassment in public forums

Places such as the Diag and Regents' Plaza are dedicated public forums which lend themselves to facilitating the free exchange of ideas within the University community. In many respects they resemble the public park or street corner. Similarly, the *Michigan Review*, the *Michigan Daily* and other mass media enhance the discussion and debate of important ideas and issues. The broadest range of speech and expression will be tolerated in these areas and by these publications. Nevertheless, physical violence and destruction of property in public forums which is the result of discriminatory behavior as defined in paragraph B below are misconduct and subject to discipline. Areas which constitute dedicated public forums under this policy will be determined on a case-by-case basis by the Office of the General Counsel.

B

Discrimination and discriminatory harassment in educational and academic centers

Educational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers, etc. are the locus of the University's educational mission. Accordingly, the University has a more compelling interest in assuring an environment in which learning may thrive. At the same time, the University has an equal interest in preserv-

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Approved by the Regents on April 15, 1988.

ing the widest range of discourse within the classroom. The policy seeks to balance these competing interests. The following types of behavior are discrimination or discriminatory harassment and are subject to discipline if they occur in educational or academic centers:

1. **Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that:**
    - a. **Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or**
    - b. **Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or**
    - c. **Creates an intimidating, hostile or demeaning environment for educational pursuits, employment or participation in University sponsored extracurricular activities.**
2. **Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation where such behavior:**
    - a. **Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or**
    - b. **Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or**
    - c. **Creates an intimidating, hostile or demeaning environment for educational pursuits, employment, or participation in University sponsored extracurricular activities.**

C
Discrimination and discriminatory harassment in University Housing

All members of the University community who live in or visit University Housing are expected to abide by the same behavioral obligations that residents assume in executing their leases. Residents who violate their contractual obligations are subject to the full range of penalties provided under their leases including, but not limited to termination of the lease, as well as sanctions described in this policy. Non-resident students who violate the standards of appropriate behavior in University Housing are subject to discipline under this policy. Copies of the Living at Michigan Credo and other standards of behavior in University Housing are available in each housing unit.

D
False Accusations

A student who knowingly and intentionally files a false complaint under this policy is subject to discipline.

IDENTIFYING DISCRIMINATORY BEHAVIOR

Not every act that might be offensive to an individual or a group necessarily will be considered a violation of this policy. Whether a specific act violates the policy will be determined on a case-by-case basis with proper regard for all of the circumstances. Due consideration must be given to the protection of individual rights, freedom of speech, religious and moral convictions, academic freedom and advocacy. The Office of the General Counsel will rule on any claim that conduct which is the subject of a formal hearing is constitutionally protected by the first amendment.

RESPONDING TO DISCRIMINATORY BEHAVIOR AMONG STUDENTS

Informational posters and brochures will be developed indicating the counseling resources available and the informal and formal mechanisms for resolving complaints of behavior which violate this policy. Schools, colleges and units will advise all of their members of these resources and procedures.

A

Information, Counseling and Support

The following University resources are available to members of the University community who seek information and counseling about University policies on harassment, other discriminatory behavior, and the informal and formal mechanisms for resolving complaints.

- **Deans, department chairs and directors are available to provide information and counseling.**
- **Office of Student Counseling Services offers a wide range of programs to assist students in solving personal problems.**
- **Affirmative Action Office assists in resolving grievances which relate to equal opportunity, discrimination and affirmative action.**
- **Office of the Ombudsman exists to assist students in resolving complaints throughout the University.**
- **Department of Public Safety and Security conducts investigations in cooperation with other offices.**
- **Sexual Assault Prevention and Awareness Center provides confidential counseling and support to victims of sexual harassment.**
- **Lesbian and Gay Male Programs Office offers confidential counseling to students on matters of human sexuality.**

B

Informal Mechanisms for Mediation and Resolution

In some instances the student may resolve the matter of inapproriate conduct successfully by discussing the matter directly with the person alleged to have caused the problem. The University encourages such informal means of mediation where practical and appropriate. The deans, directors, department chairs and affirmative action coordinators within each unit, as well as the Ombudsman and the Affirmative Action Office are available and they are encouraged to assist in informal mediation and resolution of incidents of harassment. It is the responsibility of each unit to use its mediation process in a way that minimizes the burden imposed on the person who has complained and that resolves matters in such a way that inappropriate conduct is discouraged. Units may employ educational mechanisms, community service requirements, disciplinary warnings, and restitution in achieving mediated settlements of disputes under the policy. Statements made during the informal mediation process may not be introduced into evidence at a formal hearing conducted under this policy.

C

Formal Mechanisms for Resolution and Adjudication

The University believes that a strong system of informal mediation of disputes through various channels will encourage reporting and resolution of complaints. When informal resolution is impractical or unsuccessful, individuals are urged to employ the formal mechanisms available. The broad principles of the formal procedure are described below. More detailed procedures consistent with these principles will be described in a separate document.

1. **Filing a Formal Complaint of Discriminatory Misconduct.**
   Any member of the University community may file a formal complaint of discriminatory misconduct against a student in any of the offices identified above as resources for resolving complaints of discriminatory conduct or directly with the Administrator of com-

plaints of discriminatory behavior in the Office of the Vice President for Student Services (the "Administrator"). The office initially receiving the formal complaint shall forward it to the Administrator who normally will notify the Chair and Dean in academic units and the appropriate administrator in other educational or housing units of its existence. The Administrator will conduct a preliminary investigation to determine whether there is sufficient evidence of a violation to initiate a formal hearing process. Such a review ordinarily will involve interviewing the complaining witness and the accused, as well as other witnesses if necessary. If the Administrator determines that sufficient evidence exists to conclude that a violation of the policy may have occurred, and it has not been satisfactorily resolved, either informally or by the Administrator, a formal hearing process will be initiated.

2. **Notice of Hearing.**
The Administrator shall notify the individual whose conduct is challenged of the specific charges, the identity of the complaining witness[es], the date, time, place and nature of the hearing, a summary of the information developed during the preliminary investigation, the right to assistance by counsel and the limits thereon, and the range of possible sanctions.

3. **Composition of the Hearing Panel.**
The hearing panel shall consist of four students and one tenured faculty member. Prior to the hearing, the Administrator shall provide the complaining witness and the accused with a list of enrolled students, who are eligible to serve on the hearing panel. The student governing body of each school, college and the Division of Physical Education will nominate a proportional number of students from the unit, not less than two nor greater than five, for inclusion on the list. In the event the student government of a school or college fails to nominate students to serve on these hearing panels, the students may be nominated by the Dean. The complaining witness and the accused shall each select one person from the list to serve on the panel. The Administrator shall select two additional students from the list by lot. The four student panel members shall select a fifth panel member from a list of tenured faculty members appointed by the President, in consultation with SACUA, to sit on such hearing panels.

4. **The Hearing Procedure.**
The hearings shall be conducted in an informal manner to the greatest extent possible, consistent with the protections of due process. The panel shall conduct the hearing. The Administrator is responsible for presenting the charges against the accused. Complaining witnesses may participate in this process to the extent they desire. The complaining witness and the accused may cross-examine any witness who appears before the panel. Either the complaining witness or the accused may offer sworn affidavits to the panel for consideration. Although attorneys generally will not be allowed to participate actively in the hearing, they may accompany and advise either party during the hearing. If the Administrator has notified the accused that suspension or expulsion are potential sanctions, the attorney for the accused may participate fully in the hearing, including examining witnesses, objecting to evidence and speaking on behalf of the accused. The hearing will be tape recorded. At its conclusion, the panel will discuss the evidence with the complaining witness and the accused. It will then deliberate in private. The panel is obligated to enforce the University's policy of nondiscrimination in its deliberations and decisions.

5. **The Decision of the Hearing Panel.**
If a majority of the panel finds that there is clear and convincing evidence of a violation of the policy, it shall consider and recommend an appropriate sanction, in light of all of the circumstances. It shall notify the accused of its finding and its recommended sanction. If the accused accepts the finding and the sanction, the result will be communicated to the Vice President for Student Services, who will enforce the sanctions. If the accused disputes the finding or the recommended sentence, he or she may appeal to an appellate panel comprised of one student and one faculty member selected each

year by lot from the list of eligible panel members along with the Vice President for Student Services. The appellate panel will review the evidence and independently determine both the existence of a violation and the appropriate sanction.

6. **Records of Complaints and the Hearing Process.**
All records created during the complaint and hearing process shall be maintained in compliance with state and federal laws to protect the privacy of the persons involved. None of the records created pursuant to this policy shall be included in a student's academic file.

7. **Threats and Intimidation.**
Threats or other forms of intimidation or retaliation against complaining witness, any other witness or any member of a hearing panel constitute a separate violation of this policy.

D
Sanctions

Hearing panels should fashion sanctions commensurate with the offending conduct. Because education may be the most effective and appropriate means of addressing discriminatory behavior, the University encourages hearing panels to fashion sanctions which include an educational element. Class attendance as set forth in 3 below should not be employed, however, in an attempt to change deeply held religious or moral convictions. Rather, the sanctions should be designed to deter the student from harassing others. Regrettably, some conduct is so harmful to members of the University community or deleterious to the educational process that it requires more punitive sanctions. Hearing panels should impose such sanctions where appropriate.

Certain factors should be considered in fashioning the sanctions, including the intent of the accused, the effect of the conduct on the victim and the University community, the degree of remorse, whether the student has violated the policy in the past, whether sanctions such as education and community service are likely to change the student's attitudes, and the effect of the sanction on the student's standing within the University. The most severe sanctions, suspension from specific courses or activities, suspension from the University and expulsion, should be imposed only when the offending behavior involved violent or dangerous acts, repeated offenses, or willful failure to comply with a lesser sanction. The range of potential sanctions is as follows:

1. **Formal Reprimand:** The individual receives a formal reprimand for violating the policy and a warning that future violations will be dealt with more harshly.
2. **Community Service:** The panel may require offenders to perform an appropriate amount of public service that is both beneficial to the community and likely to assist the individual in overcoming his or her discriminatory attitudes or conduct. The Administrator shall maintain a list of appropriate community service activities.
3. **Class Attendance:** The panel may require an individual to enroll in and complete a class that helps the person understand the situation of the group against which the remarks or behavior were directed. Lists of appropriate classes are available from the Provost and Vice President for Academic Affairs.
4. **Restitution:** Where discriminatory conduct results in physical damage to property, the panel may require restitution.
5. **Removal from University Housing:** Where conduct violates standards of behavior in University Housing, the range of sanctions included in the student's contracts with University Housing are available in addition to any other sanction provided herein.
6. **Suspension from Specific Courses or Activities:** The panel may suspend the student, either permanently or temporarily, from specific courses or activities.
7. **Suspension:** The individual may be suspended from the University for a period not exceeding one academic term. The Vice President for Student Services shall consult with the dean, chair or director in the unit in which the student is enrolled before suspension is imposed.
8. **Expulsion:** The individual may be expelled from the University. The Vice

President for Student Services shall consult with the dean, chair or director in the unit in which the student is enrolled before expulsion is imposed. More than one of the sanctions described above may be imposed.

The President of the University may set aside or lessen any sanction. The sanctions imposed under this policy do not diminish or replace the penalties available under generally applicable civil or criminal laws. Students are reminded that harassment and other discriminatory behavior may violate various state and federal laws.

ADDITIONAL EFFORTS TO ADDRESS DISCRIMINATORY BEHAVIOR

A

Education and Prevention

The prevention of harassment and the establishment of effective procedures with due concern for all parties require a thoughtful, educational program.

1. The University will provide information to deans, chairs, directors and affirmative action coordinators in each unit concerning:
    a. mediation and resolution mechanisms available;
    b. examples of incidents of harassment and possible resolutions;
    c. definitions of harassment;
    d. descriptions of how and when to report; and
    e. sources of support and information for victims and respondents.
2. Deans and heads of major administrative units are strongly encouraged to discuss this policy and issues of harassment generally at meetings of faculty, staff and graduate teaching assistants. In addition, the deans and heads of major administrative units are urged to examine prejudices and discriminatory attitudes and behaviors in their schools and colleges and devote their resources and energies to diminishing the incidence of discrimination and discriminatory harassment.
3. Training programs for residential advisors, those who meet students in crisis situations, and others serving in an advising capacity to students, will include training about referrals, resources, and methods for handling instances of harassment. The Office of Affirmative Action and the Office of Minority Affairs shall assist in the development of such training programs.
4. The Office of Student Services will develop an overall educational program for students dealing with issues of peer harassment and providing information, definition, support, identification of resources and exploration of behavioral alternatives. This educational program should be directed toward, but not restricted to, new undergraduate and graduate/professional students.
5. The University will publish annually the operative portions of this policy statement, including the resources available to advise, counsel and assist in the mediation of harassment allegations. The information will explain how and where to contact University-wide and school specific resources and will be posted in conspicuous locations.

B

Exit Interviews

The University will periodically survey departing students to measure the existence and frequency of incidents of harassment.

UNIVERSITY OF MICHIGAN

What Students Should Know About Discrimination and Discriminatory Harassment by Students in the University Environment

The University's Policy on Discrimination and Discriminatory Harassment

Discrimination is unacceptable on University of Michigan campuses. Such behavior threatens the environment of mutual respect which is essential to a University community.

All students at The University of Michigan have a right to pursue an education without experiencing discrimination or discriminatory harassment. To assure this right, the University has adopted a policy that strictly prohibits discrimination and discriminatory harassment on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status.

What is Discriminatory Harassment?

Discrimination may take many forms, ranging from comments and jokes to physical assault. It may be based on one or more of many kinds of human differences. All members of the University community are subject to disciplinary action if their behavior threatens or interferes with another person's academic efforts, employment or participation in the University community, or if it creates a hostile or demeaning environment.

The most common kinds of harassment and discrimination are racial discrimination, which victimizes a person on the basis of race; sex discrimination, which creates an unequal effect based on gender; sexual harassment, which intimidates a person on the basis of gender; or discrimination on the basis of a person's actual or presumed sexual orientation. Some examples are:

A flyer containing racist threats is distributed in a residence hall.

Racist graffiti is written on the door of an Asian student's study carrel.

A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.

Students in a residence hall have a floor party and invite everyone on their floor except one person because they think she might be a lesbian.

A Black student is confronted and racially insulted by two white students in a cafeteria.

Male students leave pornographic pictures and jokes on the desk of a female graduate student.

Two men demand that their roommate in the residence hall move out and be tested for AIDS.

IF IT HAPPENS TO YOU, TELL SOMEONE

The University provides a number of places where you can go for help, information, and advice about the policies on harassment and discrimination. Any of these offices can also give you a complete copy of the policy and procedures. You can choose the place where you will feel most comfortable.

Student Counseling Services offers **confidential** personal counseling. 3100 Michigan Union, 764-8312.

Sexual Assault Prevention and Awareness Center provides **confidential** counseling, support, advice, and assistance to victims of sexual harassment and sexual assault. 3100 Michigan Union, 763-5865.

Lesbian and Gay Male Programs Office offers **confidential** counseling to students on matters of sexual orientation, and support and assistance to victims of harassment, discrimination, and assault. 3118 Michigan Union, 763-4186.

Affirmative Action Office assists with problems related to discrimination and harassment and oversees the handling of all such complaints at the University. 108 Fleming Administration Building, 764-3423 (TDD 747-1388).

Office of the Ombudsman exists to assist students in resolving complaints throughout the University. 3000 Michigan Union, 763-3545.

Department of Public Safety and Security conducts investigations in cooperation with other offices. 525 Church Street, 763-1131.

Office of Disabled Student Services provides assistance for students with disabilities. 625 Haven Hall, 763-3000 (Voice/TDD).

Minority Student Services offers advice and support for students who are members of a minority group. 2204 Michigan Union, 763-9044.

Student Discrimination Policy Administrator, Office of the Vice President for Student Services, 3000 Michigan Union, 764-7420.

In addition, students living in University Housing may want to contact their Building Director, especially if they are concerned about an event or situation occurring in a University Housing facility.

What can you do about Discriminatory Harassment?

If you are subjected to discrimination or harassment, you can get help and advice at any of the offices listed above. You may want to report a concern, to seek counsel or support about your feelings, or you may want to make a formal complaint about something that happened to you. **Whatever the situation, you will be taken seriously and will receive help from University personnel who are specifically trained to deal with these concerns.**

If you are aware of discrimination or harassment happening to someone else, please report it. You can support others and help resolve the situation.

You can take responsibility for your own behavior and you can influence the behavior of groups to which you belong. Remember that behavior you consider teasing or a joke may be very threatening or painful to someone else.

What will happen when you TELL SOMEONE?

You will be advised of your rights and responsibilities under the policy on Discrimination and Discriminatory Harassment by Students in the University Environment. You will learn about the options available to you and the mechanisms for resolving complaints.

You may choose to resolve the matter through informal mediation. Your Dean, the University Ombudsman, and the Affirmative Action Office are among the places to go for help in informal resolution of discriminatory harassment problems.

If discrimination or harassment occurs in a University Housing facility, the initial investigation and mediation will occur under Housing administration procedures.

If informal resolution is unsatisfactory, you may choose to employ the formal mechanisms provided in University policy. A complete description of the policy and formal procedures is available in any of the offices listed above. These procedures provide for:

- Filing a formal complaint
- Investigation by the Student Policy Administrator
- Notice of a hearing
- A formal hearing before a panel of four students and one tenured faculty member
- A decision by the hearing panel
- Sanctions against persons who violate the policy; these sanctions may range from formal reprimand to suspension or expulsion from the University

Who will learn about your complaint?

The answer to this question depends on you. If you want to talk with someone about an incident of discrimination or discriminatory harassment, and you don't want any action taken or your identity disclosed, you may go to any of the following counseling centers to discuss your concern:

- **Student Counseling Services**
- **Sexual Assault Prevention and Awareness Center**
- **Lesbian and Gay Male Programs Office**

Counselors in these offices can provide you with confidential counseling and advice. If after talking with them you decide that you want to take additional action, they will assist you in this process.

If you want action to be taken by the University, your complaint will be disclosed only to those individuals who are involved in investigating and resolving it. Your complaint will not be mentioned in your academic file and it won't be disclosed to individuals outside the complaint handling process. Of course, if you want to participate in mediation, or if you request a formal investigation and hearing, the person who is accused of violating the policy must be notified of your complaint.

All records relating to your complaint are confidential. Your parents, friends, professors, etc. will not be told about your complaint.

YOU are a harasser when . . .

You exclude someone from a study group because that person is of a different race, sex, or ethnic origin than you are.

You tell jokes about gay men and lesbians.

Your student organization sponsors entertainment that includes a comedian who slurs Hispanics.

You display a confederate flag on the door of your room in the residence hall.

You laugh at and joke about someone in your class who stutters.

You make obscene phone calls or send racist notes or computer messages.

You comment in a derogatory way about a particular person or group's physical appearance or sexual orientation, or their cultural origins, or religious beliefs.

Questions About Discriminatory Harassment

What about freedom of speech?

The University recognizes and respects the fundamental right of free speech. But freedom of speech does not include the right to harass or injure others.

What will happen if I make a complaint but I don't have any witnesses to support it?

Your complaint will be taken seriously. Experience at the University has been that people almost never make false complaints about discrimination.

What about classroom discussion?

The University encourages open and vigorous intellectual discussion in the classroom. To reach this goal students must be free to participate in class discussion without feeling harassed or intimidated by others' comments.

What if I don't know who sent me an obscene computer message?

You can and should make a complaint even if you do not know who committed the offense. It is usually possible to determine who sent a message in the University computer system. But even if the harasser cannot be identified, University officials want to know about and make a record of your complaint.

The University is firmly committed to dealing with such incidents; keeping track of where and when and how they occur will help prevent patterns from developing and recurring in the future.

September 1989

POLICY STATEMENT

The University of Michigan Interim Policy on Discrimination and Discriminatory Conduct by Students in the University Environment

Preamble

Discrimination, as defined in Regental Bylaw 14.06 and the Presidential Policy Statement issued in March 1984, is unacceptable on The University of Michigan campus. Such behavior threatens to destroy the environment of tolerance and mutual respect which must prevail if a university is to fulfill its purpose.

Of equal importance on The University of Michigan campus is a strong commitment to the principle of freedom of speech guaranteed by the First Amendment to the United States Constitution, as stated in the University's Policy on Freedom of Speech, Section 601.1 in the *Standard Practice Guide*. The University is dedicated to allowing students vigorous and open academic discourse and intellectual inquiry, including speech that espouses controversial or even offensive ideas.

In the University context, a commitment to not interfere with free speech may lead to sheltering speech by students that is repugnant or morally offensive. Because of our respect for individual freedom and dignity, the sheltering of such speech is allowed in order to arrive at truth, to promote clearer reasoning by necessitating argument against opposing views, and in recognition of the fallibility of any one individual or institution in discerning the one, correct idea. Perhaps most important is that it reinforces our society's commitment to tolerance as a value.

It is clear, however, that under existing free speech jurisprudence all speech is not protected. The United States Supreme Court in *Cohen v California* (1971) recognized that the First Amendment would not protect speech when, "substantial privacy interests are ... invaded in an essentially intolerable manner." In the secondary school context, the Court said speech can be prohibited that "would materially and substantially interfere with the requirement of appropriate discipline in the operation of the school." *Tinker v Des Moines Community School District*, (1969) "Fighting words" also do not enjoy First Amendment protection. *Chaplinsky v New Hampshire*, 315 US 568, (1942) The language of these decisions shows that the Supreme Court is struggling to articulate the boundaries of protected speech.

After a thorough review of the issue, The University of Michigan has determined that it needs to intervene in speech when a student intentionally uses racial, ethnocentric or sexual invectives, epithets, slurs or utterances directly to attack or injure another individual rather than express or discuss an idea, ideology or philosophy. Such attacks go beyond the boundaries of protected free speech. In those instances, the University must protect the educational environment of the University.

Because there is tension between freedom of speech, the right of individuals to be free from injury caused by discrimination, and the University's duty to protect the educational process, the enforcement procedures assume that it is necessary to have varying standards depending upon the locus of the regulated conduct. Thus a distinction is drawn among public forums, educational and academic centers, and housing units

Prohibited Discrimination and Discriminatory Conduct

A. Discrimination and discriminatory conduct in public forums

Places such as the Diag, Regents' Plaza, the Fishbowl and the area around Burton Tower are dedicated public forums which lend themselves to facilitating the free exchange of ideas within the University community. In many respects they resemble the public park or street corner. Similarly, the *Michigan Review*, the *Michigan Daily* and other mass media enhance the discussion and debate of important ideas and issues. The broadest range of speech and expression will be tolerated in these areas and by these publications. Nevertheless, malicious and intentional verbal threats of physical violence and destruction of property in public forums which is the result of discriminatory behavior as defined in paragraph B below are misconduct and subject to discipline.

B. Discrimination and discriminatory conduct and harassment in educational and academic centers.

Educational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers, etc. are the locus of the University's educational mission. Accordingly the University has a compelling interest in assuring an environment in which learning may thrive. Such an environment requires free and unfettered discussion of the widest possible nature, encouraging expression of all points of view. The University acknowledges that the frank and open discussion of social, cultural, artistic, religious, scientific and political issues may be disturbing and even hurtful for some individuals. In such instances, the principle of free exchange and inquiry takes precedence as it is so fundamental to the educational enterprise.

Discrimination and discriminatory harassment have no place in this educational enterprise. Physical acts or threats or verbal slurs, invectives or epithets referring to an individual's race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age or handicap made with the purpose of injuring the person to whom the words or actions are directed and that are not made as a part of a discussion or exchange of an idea, ideology or philosophy are prohibited.

In order to illustrate the types of conduct which this subsection is designed to cover, the following examples are set forth. These examples do not illustrate the only situations or types of conduct intended to be covered.

(1) — A student states in a physiology class the theory that the average size of the craniums of each race is related to the average intelligence of that race. A student in the class finds the remarks personally demeaning and files a complaint. There is no violation of the Policy because, although the remarks refer to race, they were not slurs, invectives, epithets or utterances directed with intent to injure any individual student and were made as part of a classroom discussion.

(2) — In a classroom before an exam a white student uses a racial epithet to a Black student and tells her to go home and stop using a white person's space. The Black student files a complaint. There is a violation of the Policy because the remark is a slur referring to race made with the purpose of affecting a particular student's performance on the exam and is not part of an exchange or discussion of ideas.

(3)— A student during a political science class discussion of the Holocaust states that it was a good thing because it destroyed members of an inferior religion. A Jewish student in the class files a complaint. Even though the remark may have been intended to upset Jewish members of the class, it is protected under the Policy because it was made during a discussion of ideas.

(4)— A student tells a joke during class which slurs members of an ethnic group. The joke is extraneous to the class discussion at that time. A member of the ethnic group files a complaint. There is no violation of the Policy. Although the joke is not part of an exchange or discussion of ideas, it is not directed toward any individual with the purpose of injuring that person.

Students may not use race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status to affect the terms, conditions, privileges, or benefits of an individual's education, employment, housing, or participation in a University activity.

Students also may not use threats, whether explicit or implicit, concerning the terms or conditions of an individual's education, employment, housing, or participation in a University activity as a way to gain sex and sexual favors. Unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature that interfere with an individual's academic efforts, employment or participation in University-sponsored activities also are prohibited.

C. Discrimination and discriminatory conduct and harassment in University Housing -

All members of the University community who live in or visit University housing are expected to abide by the same behavioral obligations that residents assume in executing their leases. Residents who violate their contractual obligations are subject to the full range of penalties provided under their leases including, but not limited to, termination of the lease, as well as sanctions described in this policy and in the housing division policy and procedures on discrimination and discriminatory harassment. Non-resident students who violate the standards of appropriate behavior in University housing are subject to discipline under this interim policy. Copies of the "Living at Michigan Credo" and other standards of behavior in University housing are available in each housing unit.

D. False Accusations

A student who knowingly and intentionally files a false complaint under this policy is subject to discipline.

Identifying Discriminatory Behavior

Not every act that might be offensive to an individual or a group necessarily will be considered a violation of this policy. Whether a specific act violates the policy will be determined with proper regard for all of the circumstances. Due consideration must be given to the protection of freedom of speech, including offensive speech, and also to individual rights, religious and moral convictions, academic freedom and advocacy. The Office of the General Counsel will review all complaints filed under the policy to guarantee that First Amendment protections are observed.

Responding to Complaints of Discriminatory Behavior Among Students

Informational posters and brochures will be developed indicating the counseling resources available and the informal and formal mechanisms for resolving complaints of behavior which violate this policy. Schools, colleges and units will advise all of their members of these resources and procedures.

A. Persons or Offices Designated to Receive Complaints

The following University resources are available to members of the University community who seek information and counseling about University policies on harassment and other discriminatory behavior, the filing of complaints and the informal and formal mechanisms for resolving complaints.

— **Student Discrimination Policy Administrator,** Office of the Vice President for Student Services, is responsible for receiving and investigating any complaints of discrimination and discriminatory harassment by students, as well as coordinating the resolution of complaints — either formal or informal. 3000 Michigan Union, 764-7420.

— **Deans, department chairs and directors** within the various units.

— **Counseling Services** offers a wide range of programs to assist students in solving personal problems.

— **Affirmative Action Office** receives complaints and assists with problems related to discrimination and harassment and monitors the handling of all such complaints at the University. 108 Fleming Administration Building, 763-0235 (TDD 747-1388).

— **Office of the Ombudsman** exists to assist students in resolving complaints throughout the University. 3000 Michigan Union, 763-3545.

— **Housing Division Building Directors** in cooperation with Housing Security and/or other university staff, are responsible for handling, investigating, and resolving complaints of discrimination and discriminatory harassment occurring in University residence halls. Family Housing residents should contact the Family Housing Office. Residents and non-residents are encouraged to obtain and review housing procedures.

— **Department of Public Safety and Security** will take reports for investigation under the student policy and/or for criminal prosecution, as well as work in cooperation with other offices. 525 Church Street, 763-1131, EMERGENCY (on-campus phone — 911).

B. Confidential Personal Counseling and Assistance for Those Affected by Discrimination and Others

The University offers an individual the choice of seeking confidential personal counseling if he or she desires. Such counseling lies outside the University's mechanisms for resolving complaints of discrimination and discriminatory harassment; the services are intended solely for the personal benefit of the person. In general, these offices can offer a setting where it is possible to explore personal feelings and examine possible courses of action within the context of professional confidentiality. In addition to personal counseling some offices can assist individuals involved in reports of harassment throughout the informal and formal processes; this can include providing information, support in meetings, hearings, etc., and general advocacy for the person's interests. Other agencies can provide information and help with referrals to other resources. Individuals seeking counseling assistance should check with the office in question, as each unit has its own mandate and guidelines for providing services. Confidential personal counseling is available in the following offices:

— **Counseling Services** offers confidential counseling to assist students in solving personal problems. 3100 Michigan Union. 764-8312.

— **Sexual Assault Prevention and Awareness Center** provides counseling, support, advice, and assistance to students, family and staff on situations of sexual harassment and sexual assault. 3100 Michigan Union, 763-5865. 24-hour counseling line 936-3333.

— **Lesbian and Gay Male Programs Office** offers counseling to students, staff and faculty on matters of sexual orientation, and support and assistance to victims of harassment, discrimination, and assault. 3118 Michigan Union, 763-4186.

Although these offices can provide useful information to an individual about the University's resources for reporting and resolving discriminatory behavior, discussions with these counselors do not constitute official reports to the University. Because this information is confidential, the University will not take action in response to privileged information about discrimination disclosed to counselors in these offices, unless required by a court of law.

C. Informal Mechanisms for Mediation and Resolution

The University believes that a strong system of informal mediation of disputes through various channels will encourage reporting and resolution of complaints. The deans, directors, department chairs and affirmative action coordinators within each unit as well as the Ombudsman and the Affirmative Action Office are available and they are encouraged to assist in informal mediation and resolution of incidents of harassment. It is the responsibility of each unit to use its mediation process in a way that minimizes the burden imposed on the person who has complained and that resolves matters in such a way that inappropriate conduct is discouraged. Units may employ educational mechanisms, community service requirements, disciplinary warnings, and restitution in achieving mediated settlements of disputes under the policy. Statements made during the informal mediation process may not be introduced into evidence at a formal hearing conducted under this policy.

D. Formal mechanisms for Resolution and Adjudication

When informal resolution is impractical or unsuccessful, individuals are urged to employ the formal mechanisms available. The broad principles of the formal procedure are described below. More detailed procedures consistent with these principles are described in a separate document also titled "Formal Mechanisms for Resolution and Adjudication."

1. Filing a Formal Complaint of Discriminatory Misconduct.

Any member of the University community may file a formal complaint of discriminatory misconduct against a student in any of the offices identified above as resources for resolving complaints of discriminatory conduct or directly with the Student Discrimination Policy Administrator in the Office of the Vice President for Student Services (the "Administrator"). The office initially receiving the formal complaint shall forward it to the Administrator who normally will notify the chair and dean in academic units and the appropriate administrator in other educational or housing units of its existence. The Administrator shall consult with the Office of the General Counsel as to any First Amendment implications in the complaint. The Administrator will conduct a preliminary investigation to determine whether there is sufficient evidence of a violation to initiate a formal hearing process. Such a review ordinarily will involve interviewing the complaining witness and the accused, as well as other witnesses if necessary. If the Administrator determines that sufficient evidence exists to conclude that a violation of the policy may have occurred, and it has not been satisfactorily resolved, either informally or by the Administrator, a formal hearing process will be initiated.

2. Notice of Hearing

The Administrator shall notify the individual whose conduct is challenged of the specific charges, the identity of the complaining witness(es), the date, time, place and nature of the hearing, a summary of the information developed during the preliminary investigation, the right to assistance by counsel and the limits thereon, and the range of possible sanctions.

3. Composition of the Hearing Panel

The hearing panel shall consist of four students and one tenured faculty member. Prior to the hearing, the Administrator shall provide the complaining witness and the accused with a list of enrolled students who are eligible to serve on the hearing panel. The student governing body of each school and college and the Division of Physical Education will nominate a proportional number of students from the unit, not less than two nor greater than five, for inclusion on the list. In the event the student government of a school or college fails to nominate students to serve on these hearing panels, the students may be nominated by the dean. The complaining witness and the accused shall each select one person from the list to serve on the panel. The Administrator shall select two additional students from the list by lot. The four student panel members shall select a fifth panel member from a list of tenured faculty members appointed by the President, in consultation with SACUA, to sit on such hearing panels.

4. The Hearing Procedure

The hearings shall be conducted in an informal manner to the greatest extend possible, consistent with the protections of due process. The panel shall conduct the hearing. The Administrator is responsible for presenting the charges against the accused. Complaining witnesses may participate in this process to the extent they desire. The complaining witness, the accused and the panel may cross-examine any witness who appears before the panel. Either the complaining witness or the accused may offer sworn affidavits to the panel for consideration. Although attorneys generally will not be allowed to participate actively in the hearing, they may accompany and advise either party during the hearing. If the Administrator has notified the accused that suspension or expulsion are potential sanctions, the attorney for the accused may participate fully in the hearing, including examining witnesses, objecting to evidence and speaking on behalf of the accused. The hearing will be recorded. The panel will then deliberate in private. The panel is obligated to enforce the University's policy of nondiscrimination in its deliberations and decisions.

5. The Decision of the Hearing Panel

If a majority of the panel finds that there is clear and convincing evidence of a violation of the Policy, it shall consider and recommend an appropriate sanction, in light of all of the circumstances. It shall notify the accused of its finding and its recommended sanction. If the accused accepts the finding and the sanction, the result will be communicated to the Vice President for Student Services, who will enforce the sanctions. If the accused disputes the finding or the recommended sanction, he or she may appeal to an appellate panel comprised of one student and one faculty member selected each year by lot from the list of eligible panel members along with the Vice President for Student Services. The appellate panel will review the evidence and independently determine both the existence of a violation and the appropriate sanction.

6. Records of Complaints and the Hearing Process

All records created during the complaint and hearing process shall be maintained in compliance with state and federal laws to protect the privacy of the persons involved. None of the records created pursuant to this policy shall be included in a student's academic file.

7. Threats and Intimidation

Threats or other forms of intimidation or retaliation against a complaining witness, any other witness or any member of a hearing panel constitute a separate violation of this policy.

E. Sanctions

Hearing panels should fashion sanctions commensurate with the offending conduct. Because education may be the most effective and appropriate means of addressing discriminatory behavior, the University encourages hearing panels to fashion sanctions which include an educational element. Class attendance as set forth in 3 below should not be employed, however, in an attempt to change deeply held religious or moral convictions. Rather, the sanctions should be designed to deter the student from discriminatory conduct. Regrettably, some conduct is so harmful to members of the University community or deleterious to the educational process that it requires more punitive sanctions. Hearing panels should impose such sanctions where appropriate.

Certain factors should be considered in fashioning the sanctions. They include the intent of the accused, the effect of the conduct on the victim and the University community, the degree of remorse, whether the student has violated the policy in the past, whether sanctions such as education and community service are likely to change the student's conduct, and the effect of the sanction on the student's standing within the University. The most severe sanctions, suspension from specific courses or activities, suspension from the University and expulsion, should be imposed only when the offending behavior involved violent or dangerous acts, repeated offenses, or willful failure to comply with a lesser sanction. The range of potential sanctions is as follows:

1. **Formal Reprimand:** The individual receives a formal reprimand for violating the policy and a warning that future violations will be dealt with more harshly.

2. **Community Service:** The panel may require offenders to perform an appropriate amount of public service that is both beneficial to the community and likely to assist the individual in understanding the harm caused by his or her discriminatory attitudes or conduct. The Administrator shall maintain a list of appropriate community service activities.

3. **Class Attendance:** The panel may require an individual to enroll in and complete a class that helps the person understand why the Policy prohibits the conduct involved. Lists of appropriate classes are available from the Provost and Vice President for Academic Affairs.

4. **Restitution:** Where discriminatory conduct results in physical damage to persons or property, the panel may require restitution.

5. **University Housing:** Where conduct violates standards of behavior in University housing, the standards described in the publication titled "Housing Procedures on Discrimination and Discriminatory Harassment and the Related University of Michigan Policy on Discrimination and Discriminatory Harassment by Students in the University Environment" will be used and the sanctions described therein may be applied as appropriate.

6. **Suspension from Specific Courses or Activities:** The panel may suspend the student, either permanently or temporarily, from specific courses or activities.

7. **Suspension:** The individual may be suspended from the University for a period not exceeding one academic term. The Vice President for Student Services shall consult with the dean, chair or director in the unit in which the student is enrolled before suspension is imposed.

8. **Expulsion:** The individual may be expelled from the University. The Vice President for Student Services shall consult with the dean, chair or director in the unit in which the student is enrolled before expulsion is imposed.

9. **Combined Sanctions:** A combination of the sanctions described above may be imposed.

The President of the University may set aside or lessen any sanction. The sanctions imposed under this policy do not diminish or replace the penalties available under generally applicable civil or criminal laws. Students are reminded that harassment and other discriminatory behavior may violate various state and federal laws, in particular, MCL 750.147b which makes ethnic intimidation a felony.

Additional Efforts to Address Discriminatory Behavior

A. Education and Prevention

The prevention of discriminatory conduct and the establishment of effective procedures with due concern for all parties require a thoughtful, educational program.

1. The University will provide information to deans, chairs, directors and affirmative action coordinators in each unit concerning: (a) education about the rights of free speech and academic freedom; (b) mediation and resolution mechanisms available; (c) examples of incidents of discriminatory conduct and possible resolutions; (d) definitions of discriminatory conduct and harassment; (e) descriptions of how and when to report; and (f) sources of support and information for victims and respondents.

2. Deans and heads of major administrative units are strongly encouraged to discuss this policy and issues of discriminatory conduct in general at meetings of faculty, staff and teaching assistants. In addition, the deans and heads of major administrative units are urged to examine prejudices and discriminatory behaviors in their schools and colleges and devote their resources and energies to diminishing the incidence of discrimination and discriminatory harassment.

3. Training programs for residential advisers, those who meet students in crisis situations and others serving in an advising capacity to students, will include training about referrals, resources, and methods for handling instances of discriminatory conduct. The Office of Affirmative Action and the Office of Minority Affairs shall assist in the development of such training programs.

4. The Office of Student Services will develop an overall educational program for students dealing with issues of discriminatory harassment and providing information, definition, support, identification of resources and exploration of behavioral alternatives. This educational program should be directed toward, but not restricted to, new undergraduate and graduate/professional students.

5. The University will publish annually the operative portions of this policy statement, including the resources available to advise, counsel and assist in the mediation of allegation of harassment. The information will explain how and where to contact Universitywide and school specific resources and will be posted in conspicuous locations.

B. Exit Interviews

The University will periodically survey departing students to measure the existence and frequency of incidents of discriminatory conduct.

II. SAMPLE RACIAL HARASSMENT POLICIES OR POLICY DRAFTS ADOPTED OR PROPOSED BY OTHER UNIVERSITIES

STANFORD UNIVERSITY

Interpretation of Fundamental Standard to face second round of public comment

PROPOSED INTERPRETATION OF THE FUNDAMENTAL STANDARD

The Student Conduct Legislative Council (SCLC) authors and amends both academic and non-academic codes of conduct that relate to students. On April 4, the 1989-90 SCLC began the legislative process, as prescribed by the Legislative and Judicial Charter of 1968, by releasing proposed legislation to the University community for a 30-day comment period.

The SCLC has made minor changes in the comments that accompany that initial proposal and is now beginning a second comment period by releasing again the proposed Interpretation to the Fundamental Standard in the area of discriminatory harassment. This second comment period is for 14 days, with a response deadline of May 24, 1990.

As before, your comments are encouraged and should be directed in writing to Sally Cole, Judicial Affairs Office, 323 Old Union

SCLC members are:

Faculty — Robert Rabin (Chair), Tom Kane, Mark Mancall, John Perry, Alan Schwettman, Edward Solomon

Students — Ravi Bellur, Perry Friedman, Constantino Pena

Ex Officio — Edwin Sasaki, Ingrid Nava, Sally Cole

The Fundamental Standard reads:

Students at Stanford are expected to show both within and without the University such respect for order, morality, personal honor and the rights of others as is demanded of good citizens. Failure to do this will be sufficient cause for removal from the University.

The SCLC proposes to leave this statement unchanged and to follow it with this text:

Preamble

The Fundamental Standard requires that students act with "such respect for . . . the rights of others as is demanded of good citizens." Some incidents in recent years on campus have revealed doubt and disagreement about what this requirement means for students in the sensitive area where the right of free expression can conflict with the right to be free of invidious discrimination. This interpretation of the Fundamental Standard is offered by the Student Conduct Legislative Council to provide students and administrators with guidance in this area.

Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment

1. Stanford is committed to the principles of free inquiry and free expression. Students have the right to hold and vigorously defend and promote their opinions, thus entering them into the life of the University, there to flourish or wither according to their merits. Respect for this right requires that students tolerate even expression of opinions which they find abhorrent. Intimidation of students by other students in their exercise of this right, by violence or threat of violence, is therefore considered to be a violation of the Fundamental Standard.

2. Stanford is also committed to principles of equal opportunity and non-discrimination. Each student has the right of equal access to a Stanford education, without discrimination on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin. Harassment of students on the basis of any of these characteristics contributes to a hostile environment that makes access to education for those subjected to it less than equal. Such discriminatory harassment is therefore considered to be a violation of the Fundamental Standard.

This is the text of the proposed Interpretation of the Fundamental Standard as submitted by the Student Conduct Legislative Council for a second period of public comment. The wording of the Interpretation is unchanged

3. This interpretation of the Fundamental Standard is intended to clarify the point at which protected free expression ends and prohibited discriminatory harassment begins. Prohibited harassment includes discriminatory intimidation by threats of violence, and also includes personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

4. Speech or other expression constitutes harassment by personal vilification if it:

a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and

b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and

c) makes use of insulting or "fighting" words or non-verbal symbols.

In the context of discriminatory harassment by personal vilification, insulting or "fighting" words or non-verbal symbols are those "which by their very utterance inflict injury or tend to incite to an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

Comments

This interpretation first restates, in Sections 1 and 2, existing University policy on free expression and equal opportunity respectively. Stanford has affirmed the principle of free expression in its Policy on Campus Disruption, committing itself to support "the rights of all members of the University community to express their views or to protest against actions and opinions with which they disagree." The University has likewise affirmed the principle of nondiscrimination, pledging itself in the Statement of Nondiscriminatory Policy not to "discriminate against students on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin in the administration of its educational policies." In Section 3, the interpretation recognizes that the free expression and equal opportunity principles conflict in the area of discriminatory harassment, and draws the line for disciplinary purposes at "personal vilification" that discriminates on one of the bases prohibited by the University's non-discrimination policy.

1. Why prohibit "discriminatory harassment," rather than just plain harassment?

Some harassing conduct would no doubt violate the Fundamental Standard whether or not it was based on one of the recognized categories of invidious discrimination — for example, if a student, motivated by jealousy or personal dislike, harassed another with repeated middle-of-the-night phone calls. Pure face-to-face verbal abuse, if repeated, might also in some circumstances fit within the same category, even if not discriminatory. The question has thus been raised why we should then define discriminatory harassment as a separate violation of the Fundamental Standard.

The answer is suggested by reflection on the reason why the particular kinds of discrimination mentioned in the University's Statement on Nondiscriminatory Policy are singled out for special prohibition. Obviously it is University policy not to discriminate against any student in the administration of its educational policies on any arbitrary or unjust basis. Why then enumerate "sex, race, color, handicap, religion, sexual orientation, and national and ethnic origin" as specially prohibited bases for discrimination? The reason is that, in this society at this time, these characteristics tend to make individuals the target of socially pervasive invidious discrimination. These characteristics thus tend to serve as the basis for cumulative discrimination: repetitive stigma, insult, and indignity on the basis of a fundamental personal trait. In addition, for most of the groups suffering such discrimination, a long history closely associates extreme verbal abuse with intimidation by physical violence, so that vilification is experienced as assaultive in the strict sense. It is the cumulative and socially pervasive discrimination, often linked to violence, that distinguishes the intolerable injury of wounded identity caused by discriminatory harassment from the tolerable, and relatively randomly distributed, hurt of bruised feelings that results from single incidents of ordinary personally motivated name-calling, a form of hurt that we do not believe the Fundamental Standard protects against.

2. Does not "harassment" by definition require repeated acts by the individual charged?

No. Just as a single sexually coercive proposal can constitute prohibited sexual harassment, so can a single instance of vilification constitute prohibited discriminatory harassment. The reason for this is, again, the socially pervasive character of the prohibited forms of discrimination. Students with the characteristics in question have the right to pursue their Stanford education in an environment that is not more hostile to them than to others. But the injury of discriminatory denial of educational access through maintenance of a hostile environment can arise from single acts of discrimination on the part of many different individuals. To deal with a form of abuse that is repetitive to its victims, and hence constitutes the continuing injury of harassment to them, it is necessary to prohibit the individual actions that, when added up, amount to institutional discrimination.

3. Why is intent to insult or stigmatize required?

Student members of groups subject to pervasive discrimination may be injured by unintended insulting or stigmatizing remarks as well as by those made with the requisite intent. In addition, the intent requirement makes enforcement of the prohibition of discriminatory harassment more difficult, particularly since proof beyond a reasonable doubt is required to establish charges of Fundamental Standard violations.

Nevertheless, we believe that the disciplinary process should only be invoked against intentionally insulting or stigmatizing utterances. The kind of expression defined in Section 4(c) does not constitute "insulting or 'fighting' words" unless used with intent to insult. For example, a student who heard members of minority groups using the standard insulting terms for their own group in a joking way among themselves might — trying to be funny — insensitively use those terms in the same way. Such a person should be told that this is not funny, but should not be subject to disciplinary proceedings. It should also not be a disciplinary offense for a speaker to quote or mention in discussion the gutter epithets of discrimination; it is using these epithets so as to endorse their insulting connotations that causes serious injury.

4. Why is only vilification of "a small number of individuals" prohibited, and how many are too many?

The principle of free expression creates a strong presumption against prohibition of speech based upon its content. Narrow exceptions to this presumption are traditionally recognized, among other categories, for speech that is defamatory, assaultive, and (a closely related category) for speech that constitutes "insulting or 'fighting' words." The interpretation adopts the concept of "personal vilification" to help spell out what constitutes the prohibited use of fighting words in the discrimination context. Personal vilification is a narrow category of intentionally insulting or stigmatizing discriminatory statements about individuals (4a), directed to those individuals (4b), and expressed in viscerally offensive form (4c).

The requirement of individual address in Section 4(b) excludes "group defamation" — offensive statements concerning social groups directed to the campus or the public at large. The purpose of this limitation is to give extra breathing space for vigorous public debate on campus, protecting even extreme and hurtful utterance in the public context against potentially chilling effect of the threat of disciplinary proceedings.

The expression "small number" of individuals in 4(a) is meant to make clear that prohibited personal vilification does not include "group defamation" as that term has been understood in constitutional law and in campus debate. The clearest case for application of the prohibition of personal vilification is the face to face vilification of one individual by another. But more than one person can be insulted face to face, and vilification by telephone is not (for our purposes) essentially different from vilification that is literally face to face.

For reasons such as these, the exact contours of the concept of insult to "a small number of individuals" cannot be defined with mechanical precision. One limiting restriction is that the requirements of 4(a) and 4(b) go together, so that a "small number" of persons must be no more than can be and are "addressed directly" by the person conveying the vilifying message.

5. What is the legal basis for the concept of "insulting or 'fighting' words," and what is the concept's relation to the actual threat of violence on the one hand, and to the actual infliction of emotional distress on the other?

In its unanimous decision in *Chaplinsky v. New Hampshire* (1942), the Supreme Court spoke of "certain well-defined and narrowly limited classes of speech" which are outside the protection of the First Amendment because their utterance is "no essential part of any exposition of ideas" and of such "slight social value as a step to truth" that they can be prohibited on the basis of "the social interest in order and morality." Along with libel and obscenity, this category was said to include "insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

In subsequent opinions, the Court has consistently reaffirmed the basic *Chaplinsky* doctrine. At the same time, the Court has clarified the concept of "insulting or 'fighting' words" in two important ways. First, where the state attempts to punish speech for provoking violence, the threat of violence must be serious and imminent (*Gooding v. Wilson*, 1972). Second, the "insulting or fighting words" exception does not allow prohibition of utterances offensive to the public at large, but must be confined to insults or affronts addressed directly to individuals, or thrust upon a captive audience (*Cohen v. California*, 1971).

The Supreme Court's phrase "insulting or 'fighting' words" is often shortened to simply "fighting words," an expression which, while roughly capturing the sort of personally abusive language we mean to prohibit, may also have certain misleading connotations. First, the expression may imply that violence is considered an acceptable response to discriminatory vilification; but we prohibit these utterances so that disciplinary proceedings may substitute for, not supplement, violent response. Second, exclusive focus on the actual likelihood of violence might suggest that opponents of controversial speech can transform it into forbidden "fighting words" by plausibly threatening violent response to it — the so-called "heckler's veto." The speech, if it is to be subject to restraint, must also be grossly insulting by the more objective standard of commonly shared social standards. Finally, the "fighting words" terminology might be thought to imply that extreme forms of personal abuse become protected speech simply because the victims are, for example, such disciplined practitioners of non-violence, or so physically helpless, or so cowed and demoralized, that they do not, in context, pose an actual and imminent threat of violent retaliation. Such a limitation might be appropriate under a breach of the peace statute, whose sole purpose is to prevent violence, but does not make sense in an anti-discrimination provision such as this one.

Another and largely overlapping category of verbal abuse to which legal sanctions may be applied is defined by the tort law concept of "intentional infliction of emotional distress." Much of the conduct that we define as discriminatory harassment might well give rise to a civil suit for damages under the "emotional distress" rubric. But that rubric has drawbacks as the legal basis for a discriminatory harassment regulation. It is less well established in free speech law than is the fighting words concept. Further, taken as it is from tort law, it focuses primarily on the victim's reaction to abuse; the question is whether he or she suffers "severe emotional distress." We think it better in defining a disciplinary offense to focus on the prohibited conduct; we prefer not to require the victims of personal vilification to display their psychic scars in order to establish that an offense has been committed.

6. What is included and excluded by the provision requiring "symbols . . . commonly understood to convey direct and visceral hatred or contempt?"

These terms in Section 4(c) provide the most significant narrowing element in the definition of the offense of discriminatory personal vilification. They limit the offense to cases involving use of the gutter epithets and symbols of bigotry: those words, pictures, etc., that are commonly understood as assaultive insults whenever they are seriously directed against members of groups subject to pervasive discrimination. The requirement that symbols must be "commonly understood" to insult or stigmatize, and so injure "by their very utterance," narrows the discretion of enforcement authorities; it means that particular words or symbols thought to be insulting or offensive by a social group or by some of its members must also be so understood across society as a whole before they meet the proposed definition.

The kinds of expression covered are words or combinations of words (listed, not exhaustively, and with apologies for the affront involved even in listing them) such as "nigger," "kike," "faggot," and "cunt"; symbols such as KKK regalia directed at African-American students, or Nazi swastikas directed at Jewish students. By contrast, a symbol like the Confederate flag, though experienced by many African-Americans as a racist endorsement of slavery and segregation, is still widely enough accepted as an appropriate symbol of regional identity and pride that it would not in our view fall within the "commonly understood" restriction. The direction of profanities or obscenities as such at members of groups subject to discrimination is also not covered by the interpretation, nor is expression of dislike, hatred, or contempt for these groups, in the absence of the gutter epithets or their pictorial equivalents.

Making the prohibition so narrow leaves some very hurtful forms of discriminatory verbal abuse unprohibited. Substantively, this restriction is meant to ensure that no idea as such is proscribed. There is no view, however racist, sexist, homophobic, or blasphemous it may be in content, which cannot be expressed, so long as those who hold such views do not use the gutter epithets or their equivalent. Procedurally, the point of the restriction is to give clear notice of what the offense is, and to avoid politically charged contests over the meaning of debatable words and symbols in the context of disciplinary proceedings.

7. Does not the narrow definition of vilification imply approval of all "protected expression" that falls outside the definition?

Free expression could not survive if institutions were held implicitly to endorse every kind of speech that they did not prohibit. The Stanford community can and should vigorously denounce many forms of expression that are protected against disciplinary sanction. For example, while interference with free expression by force or intimidation violates the Fundamental Standard, less overt forms of silencing of diverse expression, such as too hasty charges of racism, sexism, and the like, do not. Yet the latter form of silencing is hurtful to individuals and bad for education; as such, it is to be discouraged, though by means other than the disciplinary process.

Similarly, while personal vilification violates the Fundamental Standard, even extreme expression of hatred and contempt for protected groups does not, so long as it does not contain prohibited insulting or fighting words, and is not addressed to individual members of the groups insulted. Yet such extreme expressions of hatred and contempt cause real harm. Members of the university community have every right to denounce them. At the same time, however, respect for the right of free expression — so critical to a university community — requires that students tolerate opinions which they find abhorrent. As stated in Section 1, intimidation aimed at suppressing the exercise of this right through violence, or the threat of violence, constitutes a violation of the Fundamental Standard.

In general, the disciplinary requirements that form the content of the Fundamental Standard are not meant to be a comprehensive account of good citizenship within the Stanford community. They are meant only to set a floor of minimum requirements of respect for the rights of others, requirements that can be reasonably and fairly enforced through a disciplinary process. The Stanford community should expect much more of itself by way of tolerance, diversity, free inquiry and the pursuit of equal educational opportunity than can possibly be guaranteed by any set of disciplinary rules.

University of Texas

REPORT OF PRESIDENT'S COMMITTEE ON RACIAL HARASSMENT

November 27, 1989

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INTRODUCTION

On April 17, 1989, the University Council approved a resolution urging President William H. Cunningham to create a committee to develop a policy on racial harassment at The University of Texas at Austin. On June 26, 1989, in response to this resolution, the President appointed a nine-member Ad Hoc Committee on Racial Harassment, consisting of three students, three faculty members, and three administrators. The members of the Committee are Ms. Patricia Barrera, Mr. Chris Bell, Professor Rolando Hinojosa-Smith, Dean Sharon H. Justice, Assistant Vice President Peggy A. Kruger, Associate Dean Lodis Rhodes, Mr. Cliff Vrielink, Assistant Vice President Lewis W. Wright, and Dean Mark G. Yudof (chair).

On July 20, 1989, the President met with the Committee to discuss the mission of the Committee, and on the following day he confirmed his charge in writing. His charge, in relevant part, was as follows:

> The Committee was appointed to formulate policy recommendations. It is not a fact-finding body and is not charged with making factual determinations with respect to alleged incidents of racial harassment on campus . . . . Its primary task is to determine the nature of the problem, including the contexts in which racial harassment may arise, as well as the feasibility, desirability, and legality of different approaches to the problem. With respect to these issues, the Committee should hold open hearings to receive testimony from interested faculty, staff, and students.
>
> The primary focus of the Committee is on racial harassment of students by faculty, staff, or other students. Title VII of the Civil Rights Act covers racial harassment in employment relations, and The University has policies in place to comply with the Title VII mandate. . . . A racial harassment policy that, in whole or in part, focuses on verbal harassment raises serious concerns about the free speech rights of faculty, students, and staff.
>
> . . . Disciplinary rules, while helpful, will not wipe the slate clean. They will not change the minds of all of those who act or speak with prejudice and malice. Indeed, one of the primary reasons for adopting racial harassment policies is to affirm symbolically The University's commitment to tolerance and nondiscrimination--even if the rules themselves cannot completely eliminate the problem.

The Ad Hoc Committee had access to racial harassment policies adopted by other universities, and it collected newspaper articles, cases, scholarly works, and reports on this subject. It also held public meetings on September 14, 19, and 21, 1989, and invited testimony from dozens of student leaders, particularly those from minority organizations, minority faculty members, and administrators. These meetings were advertised in the Daily Texan for more than a week, and the Dean of Students Office also distributed fliers. Among the student participants were representatives of the Mexican American Student Leadership Council, Chicano Culture Committee, Black Student Alliance, Steve Biko Committee, Cabinet of College Councils, African American Culture Committee, Asian Leadership Council, Young Conservatives of Texas, Daily Texan, Chicano Graduate Students Association, Texas Union Multiculturalism Task Force, Hillel Foundation and Tejas. In addition, all members of the university community were invited to participate in the public meetings, and speakers were taken in the order in which they signed up at the hearings. No one wishing to speak was denied that opportunity. In all, the Committee heard nine hours of testimony from forty-nine individuals, twenty-seven of them by invitation. In addition, the Ad Hoc Committee received a substantial number of written submissions and reports from students, administrators, and faculty members.

The public hearings were most informative, and the speakers, on the whole, were well-prepared and thoughtful in their presentations. The atmosphere also was one of civility and seriousness of purpose. It would not be appropriate to characterize the substance of all of the testimony, for many different points of view were expressed, and the Ad Hoc Committee made no effort to cross-examine the speakers or to verify specific allegations. It suffices to say that many speakers felt that they had experienced racism, resulting in deep feelings of personal anger, distress and isolation in the academic community. Such experiences produce alienation from, rather than a supportive relationship with, The University. They also were concerned that there was no specific place to seek redress at The University for complaints of racial harassment. Various examples of racial harassment, both subtle and overt, were related. Some individuals expressed doubt about whether a racial harassment policy would be efficacious, given the nature of the problem, while others were concerned that the new policies might undermine academic freedom and freedom of expression. Many speakers urged that The University give more emphasis to multicultural education. Finally, nearly all speakers emphasized that The University should affirm its commitment to diversity and to the elimination of racism even if there were cogent legal and policy reasons for limiting the scope of disciplinary rules.

After extensive deliberation, the Ad Hoc Committee is unanimous in its recommendations to President Cunningham and the University Council. This report is divided into five sections. The first section recommends the promulgation by the President of a Policy Memorandum entitled "Prohibition of Racial Harassment of Students," which would parallel Policy Memorandum 4.110 entitled "Sexual Harassment of Students." The new policy would be published as Appendix E in the General Information Bulletin (GIB), as Policy Memorandum 4.120 of the Policy Memoranda for The University of Texas at Austin, and reprinted as Appendix E in the Institutional Rules on Student Services and Activities. The second section identifies a number of changes that would need to be made in Chapter 11 of the Institutional Rules (Appendix C, GIB) and Chapter 9 of the Handbook of Operating Procedures to make those codes conform to the provisions of the new policy memorandum. The third section is devoted to commentary on the new racial harassment policies seeking to clarify those policies and to shed light on the choices faced by the Ad Hoc Committee. The fourth section consists of a separate statement on multicultural education. The last section is devoted to a number of suggestions for the promulgation of new rules and the implementation of the recommendations of the Ad Hoc Committee.

Section 1

POLICY MEMORANDUM ON RACIAL HARASSMENT OF STUDENTS

The Ad Hoc Committee recommends that the following Policy Memorandum on "Prohibition of Racial Harassment of Students" be adopted and printed in the General Information Bulletin as Appendix E, in the Policy Memoranda for The University of Texas at Austin as Policy Memorandum 4.120, and reprinted in the Institutional Rules on Student Services and Activities as Appendix E:

Prohibition of Racial Harassment of Students

I. Statement of Principles

In order to educate undergraduate and graduate students of diverse social, economic, racial, and ethnic backgrounds, it is essential that The University of Texas at Austin provide equal educational opportunities for all students. The University also should foster understanding of cultural diversity and cultivate the ethical and moral values that are the basis of a humane social order. To fulfill these aspirations, The University must maintain an environment free of racial intimidation, humiliation, and harassment.

Racist attitudes and beliefs may be revealed in threats and other communications or acts of violence, hatred, abuse of authority, or ill-will that assault the person or the sense of self-worth of the victims. Such communications and acts vilify, ridicule, and humiliate the victim and also can cause serious emotional distress, impede the learning process, and, in the form of "fighting words," may provoke a violent response. Racist behavior also brings dishonor to the perpetrator, demoralizes and disrupts the academic community as a whole, and diminishes the stature of The University. For all of these reasons, The University unequivocally condemns racist behavior in all of its forms.

The University also is committed to the principles of free inquiry and expression. Members of the university community have the right to hold, vigorously defend, and express their ideas and opinions, to flourish or wither according to their merits. Respect for this right requires that students tolerate expression of views that they find abhorrent. But whatever the legal boundaries of free speech, the members of an educational community should voluntarily adopt standards of civility and good taste that reflect mutual respect, understanding, and sensitivity among its diverse racial, ethnic, and cultural groups. In particular, members of the faculty represent The University and have a special role and position of authority with respect to students. They should treat students with respect and should be sensitive to the impact of their words and opinions on them.

II. Disciplinary Rules and Definition of Racial Harassment

It is the policy of The University of Texas at Austin to maintain an educational environment free from racial harassment, humiliation, and intimidation of students. Racial harassment, as defined herein, is expressly prohibited, and student, faculty, and non-faculty employee offenders are subject to disciplinary action for violation of the prohibition. *See* Chapter 11, Appendix C of *General Information Bulletin*, Chapter 11 of *Institutional Rules on Student Services and Activities* (hereinafter *Institutional Rules*), Chapter 9.49 of the *Handbook of Operating Procedures*, and Section 9.1 of Chapter III, Part One, of the *Regents' Rules*.

"Racial harassment" is defined as extreme or outrageous acts or communications that are intended to harass, intimidate, or humiliate a student or students on account of race, color, or national origin and that reasonably cause them to suffer severe emotional distress. See also Sections 11-501 and 11-804 of the Institutional Rules and Section 9.49 of the Handbook of Operating Procedures. It is unlawful for any student, faculty member, or non-faculty employee to engage in racial harassment of any student, whether the harassment takes place on or off of the campus.

If a violation of a Regents' rule or any other properly promulgated and published institutional rule or policy, other than those defining and punishing racial harassment, is committed because of the race, color, or national origin of a student or students directly harmed by the violation, such a discriminatory purpose shall be treated as an aggravating factor for the purpose of determining the appropriate discipline or penalty.

III. Procedures for Redressing Racial Harassment Complaints of Students

The "Race Relations Counselor" within the Office of the Dean of Students has been given the primary responsibility for responding to student inquiries about and receiving complaints of racial harassment, assisting such students, familiarizing them with complaint procedures and rights of appeal, and educating the members of the university community of their responsibilities under this policy memorandum. Students who believe that they have been subjected to racial harassment may consult with the Race Relations Counselor, but students also may choose to address their questions or complaints to the dean of a college or school or other university administrative official. In the latter case, the dean or administrator should immediately contact the Race Relations Counselor for consultation.

Upon the receipt of an allegation of racial harassment, the Race Relations Counselor shall ascertain the facts and provide mediation services to assist the student. These mediation services may include consultation with the student and alleged wrongdoer, either separately or together, and with counselors and deans and other administrative officers of The University. If such mediation efforts result in a solution satisfactory to the student, the student shall be asked to complete a written and signed statement to that effect. Where such mediation efforts fail or the student does not wish to pursue mediation, the student complainant may seek a formal resolution upon the submission of a written and signed statement to the Race Relations Counselor. Upon the receipt of the formal complaint, the Race Relations Counselor shall notify the appropriate university officials and forward the complaint and a written summary of the factual findings within twenty-one (21) days to the Race Relations Advisory Panel, consisting of students, faculty, and staff appointed by the President. The Panel shall investigate thoroughly the complaint and recommend a disposition to the appropriate office of The University. Complaints and Panel recommendations pertaining to faculty members shall be referred to the Office of the Provost, to students to the Office of the Dean of Students, and to employees, other than faculty members, to the Office of Equal Employment Opportunity. Such complaints shall be resolved expeditiously by the appropriate office in accordance with the established rules and procedures of The University, including applicable grievance procedures. See Institutional Rules on Student Services and Activities Subchapter 11-400 (hearings for students); Handbook of Operating Procedures Chapters 3.18 (faculty grievance procedure) and 9.49 (employee procedure).

Confidentiality shall be maintained to the extent permitted under the law, and the rights of individual students will be protected.

Section 2

RECOMMENDED CHANGES IN UNIVERSITY RULES

In order to implement the Policy Statement on "Prohibition of Racial Harassment of Students," the Ad Hoc Committee recommends that Sections 11-501 and 11-804 of the Institutional Rules and the General Information Bulletin be amended in the following manner:

> 501(a) The dean, under subchapter 11-300, or the hearing officer after a hearing under subchapter 11-400, may impose one or more of the following penalties for violation of a regents' rule, university regulation, or administrative rule:
>
> (1) admonition;
>
> (2) warning probation;
>
> (3) disciplinary probation;
>
> . . . .
>
> (6) restitution;
>
> (7) suspension of rights and privileges, including participation in athletic or extracurricular activities;
>
> . . . .

(10) suspension from the university for a period of time not to exceed one calendar year;

(11) expulsion from the university for a specific period of time not less than one year;

. . . .

(13) other penalty as deemed appropriate under the circumstances.

(b) If a violation of a regents' rule, university regulation, or administrative rule (other than Section 11-804(a)(12)) is committed because of the race, color, or national origin of a student or students directly harmed by the violation, such a discriminatory purpose shall be treated as an aggravating factor for the purpose of determining the appropriate penalty under Section 11-501(a).

11-804(a) Notwithstanding any action taken by civil authorities or agencies charged with the enforcement of the criminal laws on account of the violation, the dean may initiate disciplinary proceedings under subchapter 11-300 against a student who

. . . .

(12) engages in racial harassment of any student, whether the harassment takes place on or off of the campus. Racial harassment is defined as extreme or outrageous acts or communications that are intended to harass, intimidate, or humiliate a student or students on account of race, color, or national origin and that reasonably cause them to suffer severe emotional distress.

The Ad Hoc Committee also recommends that Section 9.49 of the Handbook of Operating Procedures, applicable to non-faculty employees, be amended in the following manner:

IIC2. Misconduct

(a) All employees are expected to maintain standards of conduct suitable and acceptable to the work environment. Disciplinary action, including dismissal, may be imposed for unacceptable conduct.

> (b) Examples of unacceptable conduct include, but are not limited to . . .
>
> (11) disorderly conduct, horseplay, harassment of students or other employees, [] including sexual or racial harassment [] (see Appendices D and E of General Information Bulletin, or use of abusive language on the premises; . . . .
>
> (3) Racially Motivated Misconduct
>
> If the misconduct under Section IIC2, other than racial harassment, is committed because of the race, color, religion, or national origin of a student or students directly harmed by the misconduct, such a discriminatory purpose shall be treated as an aggravating factor for the purpose of determining the appropriate penalty under Section IIF.

There is no need to amend the disciplinary rules applicable to faculty members. Section 9.1 of Chapter III, Part One, of the Regents' Rules requires "each member of the several teaching staffs to become acquainted with and to conform to all the rules and regulations relating to the faculty and to the proper and orderly discharge of their work" as set forth in official publications, including the Institutional Rules, Policy Memoranda for The University of Texas at Austin, and the General Information Bulletin. The publication of the Policy Memorandum on "Prohibition of Racial Harassment of Students" in these three sets of rules and policies would make them binding on the faculty.

Section 3

COMMENTARY ON PROPOSED RULES ON RACIAL HARASSMENT OF STUDENTS

Introduction

The Ad Hoc Committee's proposals embody a multifaceted approach to racial harassment of students, relying on persuasion, disciplinary rules, mediation, and education to advance the goals of eliminating racial harassment of students and affirming the value of diversity and tolerance at The University of Texas at Austin. With regard to disciplinary rules, the Ad Hoc Committee recommends two changes in existing policies. First, if a faculty member, non-faculty employee, or student violates a university rule, other than those pertaining to racial harassment, because of the race, color, or national origin of a student directly injured by the violation, such racially discriminatory conduct is made an aggravating circumstance which may lead to the more severe punishment of the wrongdoer. Thus, for example, the destruction of university property already is a disciplinary offense, but if the property is destroyed in order to vent racial prejudice, the punishment may be more severe. Second, a new offense of racial harassment of students is created, and racial harassment is defined in accordance with the modern law relating to the tort of intentional infliction of emotional distress. The Ad Hoc Committee believes that both approaches are firmly rooted in existing law and that neither approach would abridge freedom of expression under the First Amendment of the Constitution of the United States or Article I, Section 8 of the Texas Constitution.

The disciplinary rules are supplemented by a policy statement designed to affirm The University's condemnation of racist acts and communications and the value of diversity and tolerance on a campus with many racial and ethnic groups. The policy statement also affirms The University's commitment to freedom of inquiry, academic freedom, and free expression and seeks to make clear that the purpose of the racial harassment policy is not to impose an orthodoxy on the members of the university community. The statement also makes it clear that even constitutionally protected speech can inflict injury on students, and it seeks to encourage members of the academic community to abide voluntarily by standards of good taste and civility in their manner of expressing themselves--whatever their substantive views and the contours of freedom of expression.

While, no doubt, disciplinary rules are important, the primary thrust of the new policy is to give students an avenue of redress for racial harassment and to encourage the mediation of such disputes without resort to formal mechanisms. In many cases, the charge of racial harassment may arise from misunderstanding, a lack of sensitivity, or other contextual factors, and mediation and discussion may be mutually acceptable to the alleged wrongdoer and victim. Further, the disciplinary rules, reflecting the need for open discussion in an academic community and applicable constitutional limitations, are narrowly drawn, and we anticipate that many disputes not technically falling within the rules may be resolved informally. Finally, many students may be quite satisfied with informal dispute resolution, preferring to avoid adversarial proceedings, and many alleged wrongdoers, sensitive to the gravity of a charge of racism, also may be inclined toward a less public resolution of the matter. Where, however, the student complainant wishes to pursue a formal remedy, the policy expressly provides that the student is entitled, as a matter of right, to such a formal resolution of his or her complaint.

The Ad Hoc Committee was charged neither with devising a new multicultural curriculum for The University, nor with the task of reshaping extra-curricular programs to reflect the cultural and racial diversity of The University. But education in its genuine sense, not in the sense of seeking to impose "mind control" or a "pall of orthodoxy," may be useful as a preventive measure in avoiding racial harassment. In the statement on multiculturalism, the Ad Hoc Committee expresses its view on this subject.

In reviewing the proposed policies, the reader should be attentive to the scope of President Cunningham's charge to the Ad Hoc Committee. First, the proposed disciplinary policies are applicable, on or off of the campus, only where the alleged victim is a student and the alleged wrongdoer is a member of the university community. The new policy, as written, would not protect employees, official visitors, or faculty members from racial harassment, albeit there are other policies that may be applicable (e.g. Title VII regulations). The policy also would not extend to racially harassing conduct by official visitors or others who are not members of the university community. Second, the Ad Hoc Committee deliberately limited itself to harassment on the basis of race, color, and national origin, feeling that such a limitation reflects the charge to the Committee. Many universities, however, extend such protection from harassment beyond the category of race e.g. harassment on the basis of religion, handicap, sexual orientation, or veteran's status. In varying degrees, such other categories raise different policy and legal concerns, and the Ad Hoc Committee takes no position with respect to the merits of their inclusion.

Racial Motivation as an Aggravating Factor

The purpose of this provision is to build on existing university disciplinary codes and to make it clear that any disciplinary violation motivated by a racially discriminatory animus should be punished more severely than a "routine" violation. The reason for the enhancement of punishment is that such racially discriminatory infractions are more destructive of the academic community and, by degrees, more reprehensible. The "discriminatory purpose" test focuses on the racial animus of the alleged wrongdoer in relation to the race of the student victim; the race of the victim, standing alone, is not dispositive. Further, the test does not concern itself with the content of the wrongdoer's speech as such. On the other hand, the wrongdoer's words in connection with the infraction, while not an independent basis for punishment, are relevant to proving a racially discriminatory motive. Where more severe punishment is to be imposed because of such a motive, the burden of proof is on The University in any disciplinary proceeding.

The racial motivation approach builds on a number of state statutes in effect in New York, California, and elsewhere, and it is similar to Senate Bill 22, dealing with racially motivated criminal behavior, introduced in the Texas Legislature by Senator Craig Washington in the last regular legislative session. The list of discriminatory categories in the recommended policy is much shorter than in the Washington bill, but, with the exception of religion, it parallels California Penal Code Section 1170.75.

The rule on motivation also might be described as embodying a civil rights approach. Many federal and state civil rights statutes provide that criminal or civil penalties may be enhanced where racially motivated conduct is at issue. For example, a breach of an employment contract may give rise only to a civil claim for damages in state court under state law, but a breach motivated by racial discrimination is a violation of Title VII of the Civil Rights Act. Such federal statutes often have the purpose of bestowing jurisdiction on the federal courts, where Congress has determined that state courts may be inhospitable to claims of racial discrimination, but most often they also expand the remedies available to the victim.

The racial animus policy also has the advantage of relying upon existing university rules and procedures, with the animus being considered only for the purpose of determining punishment for some previously defined infraction. But one should not underestimate the breadth of this provision. For example, Section 11-804(a)(10) of the Institutional Rules forbids students from engaging in conduct that incites imminent lawlessness. This standard is taken from a leading Supreme Court case, Brandenburg v. Ohio (395 U.S. 444 (1969)), and it reflects current doctrine under the First Amendment. The proposed rule thus would allow for the enhanced punishment of students inciting imminent lawlessness against students, if the requisite discriminatory intent were proven, notwithstanding the fact that speech and not behavior was involved. Similarly, Section 11-804(a)(5) of the Institutional Rules prohibits students from defacing university property. Thus, in the light of the proposed policy, the scribbling of an insulting racial epithet on the door of a student's dormitory room, if racially motivated, would be a more serious offense.

Derivation of the Definition of Racial Harassment

The definition of racial harassment recommended by the Ad Hoc Committee draws on the modern, common law tort of intentional infliction of emotional distress. See Acosta, "The Tort of 'Outrageous Conduct' in New Mexico: Intentional Infliction of Emotional Harm Without Physical

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Injury," 19 *New Mexico Law Review* 425 (1989). Racial harassment consists of extreme and outrageous acts or communications that are intended to harass a student on the basis of race and that reasonably cause the student to suffer severe emotional distress. For the most part, the definition reflects §46 of the *Restatement (Second) of Torts* (1965), the acknowledged national standard for such torts. The primary difference is that the recommended policy refers to "acts or communications," whereas §46 generically refers to "conduct." Since the tort of intentional infliction of emotional distress always has included harms brought about by "verbal conduct," the change in wording is in the nature of a clarification and not a substantive revision.

The intermediate courts of appeals in Texas, in contexts not involving racial harassment, have approved and applied the theory of §46. *See Smith* v. *Erhard*, 715 S.W.2d 707 (Tex. App. 1986); *Tidelands Automobile Club* v. *Walters*, 699 S.W.2d 939, 941-44 (Tex. App. 1985). The Supreme Court of Texas has never specifically adopted the theory, but it has indicated in dicta that it is favorably disposed toward it. *See St. Elizabeth Hospital* v. *Garrard*, 730 S.W.2d 649 (Tex. 1987); *Fisher* v. *Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967). Courts in other jurisdictions have relied on §46 and the tort of intentional infliction of emotional distress to reach racial harassment in appropriate cases. *See, e.g., Bailey* v. *Binyon*, 583 F. Supp. 923 (N.D. Ill. 1984); *Ledsinger* v. *Burmeister*, 318 N.W.2d 558 (Mich. App. 1982); *Dominguez* v. *Stone*, 638 P.2d 423 (N.M. Ct. App. 1981) (national origin); *Agarwal* v. *Johnson*, 603 P.2d 58 (Cal. 1979); *Contreras* v. *Crown Zellerbach Inc.*, 565 P.2d 1173 (Wash. 1977).

Our research has not yielded any case in which a federal or state court has held that a recovery for intentional infliction of emotional distress for racial harassment violates the freedom of expression of the perpetrator under the federal constitution, albeit generally court opinions do not address the question. One state intermediate court, however, has declared unconstitutional (under a state constitutional provision on freedom of expression) the application of a criminal harassment statute to a case of racial intimidation through communications. *State* v. *Harrington*, 680 P.2d 666 (Ore. App. 1984). On the other hand, the United States Supreme Court implicitly upheld the constitutionality of the tort of intentional infliction of emotional distress in *Hustler Magazine* v. *Falwell* (108 S. Ct. 876 (1988)), though the Court was somewhat critical of the tort and indicated that it would not hesitate to reshape it to meet constitutional concerns (e.g. allowing a public-figure victim to recover only if the wrongdoer acted with malice).

The general rule under the First Amendment is that all expression is constitutionally protected from government punishment or censorship unless it falls within "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). Typical examples are obscenity and libel and slander, though these categories are narrowly defined and particular statutes or doctrines may be unconstitutionally vague and overbroad. Thus, there can be no guarantee as to the constitutionality of any university rule bearing on racial harassment and sensitive matters of freedom of expression. Nonetheless, the Ad Hoc Committee believes that a rule prohibiting racial harassment, predicated on the tort of intentional infliction of emotional distress, is likely to be upheld by state and federal courts. If the university rule closely follows the common law standard, we believe that a federal or state court would hold that the rule falls under a recognized exception to the general rule under the First Amendment. *See Hustler Magazine* v. *Falwell*, *supra*.

The Committee seriously considered a modification of the proposed rule to the effect that racial harassment requires a pattern of outrageous and extreme conduct by the perpetrator with respect to the victim. Such a pattern is found in many cases involving intentional infliction of emotional distress, though there has never been an express requirement to this effect, and Title VII of the Civil Rights Act of 1964 has been construed as being inapplicable to isolated slurs and incidents. *See*, *e.g.*, *Scott* v. *Sears*, *Roebuck & Co.*, 798 F.2d 1417, 1421 (7th Cir. 1986) ("isolated racial slurs" not "significant enough event to count as employment discrimination"); *Rabidue* v. *Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (sexual harassment); *Erebia* v. *Chrysler Plastic Products Co.*, 772 F.2d 1250, 1254 (6th Cir. 1985) ("incidents of racial slurs must be more than sporadic"). Reading a "pattern" requirement into the standard for intentional infliction of emotional distress in cases of racial harassment would be "safer" from a constitutional perspective. On balance, however, and in the absence of a dispositive constitutional decision, the Ad Hoc Committee decided to omit the requirement of a pattern. *Cf. Imperial Diner*, *Inc.* v. *State Human Rights Appeal Board*, 417 N.E.2d 525 (N.Y. Ct. App. 1980). Nonetheless, except in egregious cases involving the use of racial epithets, the Committee's view is that racial harassment by communication usually will require repeated verbal conduct.

What Constitutes Extreme and Outrageous Acts and Communications?

What constitutes extreme and outrageous acts and communications cannot be stated with precision, for the test is fact-oriented and flexible. See Givelber, "The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct," 82 Columbia Law Review 42 (1982). Often the courts have been better at articulating what is not encompassed within the phrase rather than what is within it. Perhaps the best articulation of the prevailing standard is set forth in Comment d to §46 of the Restatement (Second) of Torts:

> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress . . . . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

The factual context is critical to the judgment as to what acts and words are extreme and outrageous. The members of an academic community, for example, may be more outraged by racial epithets than members of some other communities. If the alleged wrongdoer, such as a professor, holds a position of authority over the student victim, this relationship may make more likely a finding of extreme and outrageous conduct. See Johnson v. Sampson, 208 N.W. 814 (Minn. 1926); Comment e to Restatement §46. Repetitive or premeditated conduct also is more likely to violate the rule. Moreover, those who would harass students on the basis of their race, color, or national origin may be assumed to have knowledge that their victims are "peculiarly susceptible to emotional distress" of this kind. See Comment f to Restatement §46. On the other hand, the proposed rule requires that the offending acts and words "reasonably cause" the victim to suffer severe emotional distress, and thus an unreasonably sensitive student would not be able to invoke successfully this rule.

What Constitutes Severe Emotional Distress?

The proposed rule requires *severe* emotional distress to trigger its application, and it is clear that the emotional distress normally coincident to a garden-variety insult will not suffice. Again, the discussion in the comments to §46 of the *Restatement (Second) of Torts* is most helpful:

> The rule . . . applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed.
>
> The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge.

Comment j to *Restatement* §46.

What Alternative Definitions of Racial Harassment Did the Ad Hoc Committee Consider and Why Did It Reject Them?

The Ad Hoc Committee considered a number of other approaches to racial harassment before embracing a policy based on intentional infliction of emotional distress. The University of Michigan, for example, adopted a policy, emulated by a number of other private and public universities, that focused on stigmatization and victimization of students, interference with academic efforts, and the creation of an intimidating or hostile educational environment. Under the Michigan rule, persons were subject to discipline for:

> 1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that
>
> a. Involves an express or implied threat to an individual's academic efforts, employment participation in University sponsored extracurricular activities or personal safety; or
>
> b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
>
> c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

By opinion of September 22, 1989, the Michigan policy was declared unconstitutional by the United States District Court for the Eastern District of Michigan. The Court stated that a university may not "establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with idea or messages sought to be conveyed," and it may not "proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people." The court held that the policy was so broad that it applied to protected speech and that, "looking at the plain language of the Policy, it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct:"

> The structure of the Policy was in two parts; one relates to cause and the other to effect. Both cause and effect must be

> present to state a prima facie violation of the Policy. The operative words in the cause section required that language must "stigmatize" or "victimize" an individual. However, both of these terms are general and elude precise definition. Moreover, it is clear that the fact that a statement may victimize or stigmatize an individual does not, in and of itself, strip it of protection under the accepted First Amendment tests.

While enjoining the enforcement of the Michigan policy, the court reviewed a number of alternative approaches to the formulation of a racial harassment policy and opined that a policy might be enforceable if it were based on "fighting words" or on intentional infliction of emotional distress:

> Under certain circumstances racial and ethnic epithets, slurs, and insults might fall within this description [of obscenity, libel or "fighting words"] and could constitutionally be prohibited by the University. In addition, such speech may also be sufficient to state a claim for common law intentional infliction of emotional distress. Ledsinger v. Burmeister, 114 Mich. App. 12, 18-19 (1982).

For all of the reasons identified by the federal district court, the Ad Hoc Committee early on abandoned the idea of recommending a racial harassment policy grounded in the Michigan approach. After the court's decision, a number of other universities withdrew similar policies, thus corroborating the Committee's decision. The Ad Hoc Committee, however, did give serious consideration to an "insulting or 'fighting' words" approach based on the United States Supreme Court's decision in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In that case, a Jehovah's Witness denounced organized religion while proselytizing in the streets of Rochester, New Hampshire, and he was removed by police officers and taken to a police station. While en route he encountered a city marshal, and Chaplinsky told him that he was "a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." The Supreme Court upheld Chaplinsky's conviction under a statute forbidding offensive or derisive words in any public place, and the Court held that these were "fighting words," not subject to First Amendment protection:

> [The] test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. [The] English language has a number of words and expressions which by general consent are "fighting words" when said

> without a disarming smile. [Such] words, as ordinary men know, are likely to cause a fight. . . . [The] statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace . . . .
>
> . . . .
>
> [A] statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law.
>
> . . . .
>
> Argument is unnecessary to demonstrate that the appellations "damn racketeer" and "damn Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

A number of universities, including the University of California at Berkeley, has adopted a "fighting words" approach. Perhaps the best example of such an approach is a policy currently under consideration by Stanford University, a private university not technically subject to First Amendment restrictions. The draft proposal recommends the following interpretation of Stanford's "Fundamental Standard:"

> 3. . . . Prohibited harassment includes discriminatory intimidation by threats of violence, and also includes personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.
>
> 4. Speech or other expression constitutes harassment by personal vilification if it:
>
> (a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
>
> (b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
>
> (c) makes use of "fighting" words or non-verbal symbols.

> In the context of discriminatory harassment, "fighting" words or non-verbal symbols are words, pictures or other symbols that, by virtue of their form, are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

In the comments to the proposal, the author expressly states that the phrase "fighting words" should not be read "to imply that an actual threat or likelihood of violent response is a necessary element" for application of the concept:

> [S]tatements that in themselves constitute "fighting words" do not become protected speech simply because their immediate victims are, for example, such disciplined practitioners of non-violence, or so physically helpless, or so cowed and demoralized, that they do not, in context, pose a realistic physical threat.

The Ad Hoc Committee decided to reject the "fighting words" approach for a number of cogent reasons. First, there is good reason to doubt that the "fighting words" doctrine is still "good law." In the decades since Chaplinsky, there has not been a single majority opinion in the Supreme Court applying the doctrine so as to sustain a limitation on speech. See, e.g., Texas v. Johnson, 109 S.Ct. 2533 (1989) (conviction for burning American flag overturned). By way of contrast, the exception for intentional infliction of emotional distress is on a far firmer constitutional foundation. Further, there have been a number of cases in which convictions were overturned where the words used appear to be as offensive or more offensive than those in Chaplinsky, and the Court held that the applicable statutes were unconstitutionally vague or overbroad. See, e.g., Gooding v. Wilson, 405 U.S. 518 (1972) (Gooding said to a police officer: "White son of a bitch, I'll kill you;" "You son of a bitch, I'll choke you to death."); Lewis v. New Orleans, 415 U.S. 130 (1974); Brown v. Oklahoma, 408 U.S. 914 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576 (1969).

Second, the Stanford approach appears to classify certain words as "fighting words," even if, in context, there is almost no likelihood of violence. This effort to identify particular words or phrases as inherently provocative, regardless of the circumstances, is directly contrary to the established doctrine (see Texas v. Johnson, supra). Further, severe emotional distress may be present even where the victim is unlikely to respond with violence, and violence may occur even where the emotional harm is slight.

Third, the underlying concern of a racial harassment policy is the insult to or humiliation of students on the basis of race or ethnicity, with the concomitant infliction of emotional distress, and yet the "fighting words" approach attempts to dress up this concern in the guise of "fighting words." Thus, there is an incongruity between the real reason for the policy (avoidance of racially discriminatory humiliation and emotional distress) and the constitutional reason (avoidance of violence), the doctrinal box into which the draftsmen are attempting to make the real reason fit. It is much preferable for a racial harassment policy to focus on the real injury of severe emotional distress. If extreme and outrageous racial slurs or epithets, in context, are intended to and, in fact, do cause such injury, then the proposed policy would be fully applicable.

Does the Proposed Policy Allow for Punishment for Racial Harassment of a Group of Students?

Much depends on the particular circumstances, but in general the answer is yes. If the words are extreme and outrageous, intended to harass, and cause serious emotional distress, the wrong may be committed against a group of listeners. Abstract statements not addressed to particular listeners, however, would not qualify.

Does the Proposed Policy Apply to Racial Harassment Occurring Off-Campus?

Yes. The University has an overriding interest in protecting students from racial harassment by other members of the university community, wherever it occurs. A similar theory underlies The University's anti-hazing policy.

Does the Proposed Policy Apply to Racial Harassment of Members of the Teaching Faculty?

No, only students are protected by the proposed policy.

Does the Proposed Policy Apply to Racial Harassment of Students by Tenured and Untenured Members of the Faculty?

Yes, they are subject to the normal range of disciplinary penalties pursuant to the Regents' Rules.

How Might a Complainant Show that He or She Suffered from Severe Emotional Distress as a Result of the Wrongdoer's Acts or Communications?

In some cases the injury may be inferred from the outrageousness of the conduct. In addition, a victim may ask his or her physician, counselor, or other person who treated the victim's symptoms of the racial harassment to attest to the impact of the harassment on the victim.

Are there any Penalties Against the Complainant if the Allegations of Racial Harassment are Determined to be Unfounded or Frivolous?

No, but the complainant should be advised of the seriousness of the charge of racial harassment and the injury done to innocent members of the university community who are wrongly accused of such harassment.

If a Student Files a Complaint of Racial Harassment, is That Fact Noted on His or Her Permanent Record?

No.

Are Discussions of Such Topics as Affirmative Action, School Desegregation, Divestment of Stock in Companies Doing Business in South Africa, or Other Controversial Matters Subject to the Disciplinary Rule Against Racial Harassment?

Vehement debate and the assertion of opinions on race relations and other matters, whether they are widely accepted or are abhorrent to some or most members of the academic community, do not constitute racial harassment and will not fall within the disciplinary policy. Such opinions and views of members of the university community are protected by the First Amendment.

What if a Member of the University Community Engages in a Series of Infractions, With Different Victims in Each Case, Involving Racial Harassment?

A series of infractions may be probative to showing that any particular infraction was extreme and outrageous. Further, the decisionmaker may enhance the punishment where there has been previous misconduct of the same type.

Are All Racial Epithets Forbidden?

It is assumed that in most cases the use of racial epithets will constitute extreme and outrageous behavior falling within the disciplinary policy. But the factual context is critical. In some cases, the epithets may be used for a literary or historical purposes and therefore not constitute extreme and outrageous behavior. In other cases, the decisionmaker may determine that there was no severe emotional distress resulting from the behavior.

Is the Mediation Procedure Limited to Cases Falling Within the Disciplinary Rules?

No. The Ad Hoc Committee believes that many complaints may be suitable for informal, voluntary mediation even if they do not fall within the disciplinary rules for racial harassment.

Does the Race Relations Counselor have the Authority to Resolve Complaints?

No. The role of the Race Relations Counselor is limited to assisting students, mediating disputes, referring matters to appropriate university officials, educating the academic community, and keeping appropriate records.

Does the Race Relations Panel Have the Authority to Resolve Complaints?

No, the Race Relations Panel only has the authority to recommend a disposition to the appropriate university official.

Must a Student Accept Mediation or Informal Resolution of His or Her Complaint of Racial Harassment?

No.

Must the Alleged Wrongdoer Accept Mediation or Informal Dispute Resolution?

No.

Who Actually Will Make the Decision When a Formal Complaint of Racial Harassment is Made?

For complaints against faculty members, the decision will be made in the Office of the Provost, and for those against students the decision will be made in the Office of the Dean of Students. With respect to non-faculty employees, the situation is more complex. The complaint will be forwarded to the Office of Equal Employment Opportunity, and from there the complaint will be forwarded to the administrator responsible for the entity employing the alleged wrongdoer. No decisions actually will be made in the Office of Equal Employment Opportunity.

Does a Complainant Have a Right to a Formal Hearing Before the Race Relations Advisory Panel or the Official Charged With the Responsibility for Resolving the Complaint of Racial Harassment?

No. They are obligated to conduct a thorough investigation of the complaint of racial harassment. Ordinarily, such an investigation should include meetings with the complainant, the alleged wrongdoer, and other involved parties in order to facilitate the fact-finding process. Once a disciplinary penalty is proposed, however, the wrongdoer is entitled to a hearing under pre-existing university rules applicable to students, faculty, and non-faculty employees. The decision of the hearing officer or body may be appealed by the alleged wrongdoer in accordance with pre-existing university rules.

What Impact will the Proposed Recommendations on Racial Harassment Have on Existing Grievance Procedures?

None. Once a complaint is referred to the appropriate university official and a sanction or penalty is to be imposed, the alleged wrongdoer, whether student, non-faculty employee, or faculty member, would have his or her full right to invoke applicable grievance procedures.

Section 4

STATEMENT ON MULTICULTURAL EDUCATION

For the newcomer The University may be an intimidating place. The size of the University campus, the large and diverse student body, the extensive physical plant, the numerous faculty, staff, and other service personnel may appear forbidding to any newcomer --particularly where the newcomers are still in their teenage years and possess little knowledge and information about The University. And, when the newcomers are entering first-year students or recent transfer students, with few friends or acquaintances on campus, the prospects for adjustment can be daunting. This is an ongoing reality at The University of Texas at Austin, one of the largest universities in the nation, and it is one that is faced by many students at the start of every academic term. Indeed, many students in their second and third years may still face difficulties in identifying available services and other support systems that would ease the students' life at the University. At times there may be too much information and not enough time to assimilate it. To add to this, students face a demanding academic program.

For African American, Asian American, Mexican American, and other students the adjustment may be even more difficult as they seek to understand and adjust to the majority culture while preserving their own cultural heritage and self-identity. They combat the frustration and alienation faced by all students, but the situation is exacerbated and magnified by overt or subtle racism, both real and imagined. That students are sometimes racially harassed cannot be denied. Although the testimony heard by the Ad Hoc Committee was unverified, we were impressed at the number of students who genuinely believed that they had seen racism at first hand. And no matter what the incidence of such unfortunate events, even a single incident feeds the alienation and isolation that already exists. This combination of circumstances may undermine their well-being and cause them to question whether they are welcome at The University.

This situation is as frustrating to the institution as it is to the students, and the problem may never be solved to everyone's satisfaction. Still, The University is not indifferent to the problem. The Office of the Dean of Students offers many services, and the overwhelming majority of our students avail themselves of these services through orientation and other special programs sponsored by that office. Unfortunately, however, appearances do influence and distort the reality of any situation.

The Ad Hoc Committee recommends that orientation for all new students should continue to include sensitivity sessions to reduce the level of misunderstanding among different cultural groups. In addition, the Texas Union programs on multiculturalism, designed for students, should be continued and expanded.

Many students complained about the high-handedness and insensitivity of some professors in carrying out their academic responsibilities. The Ad Hoc Committee recommends that the Center for Teaching Effectiveness, pursuant to directions from the Provost, sponsor seminars addressing these issues in a multicultural academic setting. The seminars should be presented to both new and experienced faculty at The University. In addition, the Office of Personnel Services and Employee Relations, pursuant to directions from the Vice President for Business Affairs, should implement a similar program for non-faculty employees.

The Ad Hoc Committee further recommends that faculty governing bodies should take the lead and act as quickly as possible to combat cultural alienation and racial harassment. The faculty's sustained cooperation in this regard is vital if The University is to succeed in creating a healthy scholarly atmosphere for all of its faculty and students, irrespective of race, color, or national origin.

Finally, the requirements of degree programs should include courses that foster an understanding of the responsibilities of living in a multicultural community, nation, and world. The Ad Hoc Committee recommends that the curriculum be reexamined, and, where appropriate, a reassessment of the form and content of particular courses should be undertaken. Consideration should be given to the inclusion of required courses that deal with the social sciences and the arts with respect to people of different cultural backgrounds. The faculty, again, should take the lead in this regard and set timely dates for implementation of new initiatives. In this regard, the Committee supports the exemplary educational objectives pertaining to cross-cultural studies contained in the principles promulgated by The Higher Education Coordinating Board in its letter of October 30, 1989.

Section 5

SUGGESTIONS ON IMPLEMENTATION

If the report of the Ad Hoc Committee is to have a positive impact on race relations at The University of Texas at Austin, it is critical to plan for the promulgation and implementation of the recommended policies. Before new rules on racial harassment are officially promulgated in the General Information Bulletin, the Handbook of Operating Procedures, the Policy Memoranda for The University of Texas at Austin, and the Institutional Rules on Student Services and Activities, we recommend that the President expeditiously disseminate the report of the Ad Hoc Committee to the entire university community for its review.

The review period should extend until the January 29, 1990, scheduled meeting of The University Council, and we recommend that the President encourage written submissions to the members of the University Council. The January 29 meeting then might be devoted, in whole or in part, to a public meeting on the proposed racial harassment policies in which members of the Council and interested non-members might express their questions, opinions, and concerns to the Council. The members of the Ad Hoc Committee would be present to summarize the report and to answer questions. This meeting, at which no vote would be taken, would suffice for a first reading of the report. The Council would then take up the report at a subsequent meeting, having the full benefit of the views of the university community, and thereafter the Council would act on the Ad Hoc Committee's report.

Once new racial harassment policies have been promulgated, it is critical that The University provide the support and assistance to ensure the effective and fair implementation of the policy. The principles of adequate notice of misconduct, adherence to due process procedures, and certainty in defining infractions and remedies are the cornerstones of such implementation. These principles protect the rights of those victimized by racial harassment and those accused of it. In this light, the Ad Hoc Committee recommends that the following steps be taken:

1. The President should appoint an advisory committee to review and assess the effectiveness of the policies prohibiting racial harassment, the procedures used to adjudicate or mediate alleged cases of racial harassment, and the programs designed to encourage multicultural education. The committee should hold regularly scheduled meetings and advise the President on recommended changes in the policies.

2. An "Office of Race Relations Counseling and Mediation Service" should be established in the Office of the Dean of Students. The necessary staff, space, equipment, supplies, publicity, and travel funds should be allocated to the Dean of Students Office to make the Race Relations Counseling and Mediation Service effective in its mission as described previously in this report.

3. The University should allocate sufficient funds for the Race Relations Counseling and Mediation Service staff to support development and training opportunities including formal programs in conflict resolution and mediation.

4. The Faculty Senate should appoint a committee on multicultural education composed of faculty and students. The charge of the committee would be to develop recommendations for a comprehensive curricular and extra-curricular program of multicultural education for The University.

Respectfully submitted,

Ms. Patricia Barrera
Mr. Chris Bell
Professor Rolando Hinojosa-Smith
Dean Sharon H. Justice
Asst. Vice President Peggy A. Kruger
Associate Dean Lodis Rhodes
Mr. Cliff Vrielink
Asst. Vice President Lewis W. Wright
Dean Mark G. Yudof

UNIVERSITY OF CALIFORNIA

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DAVID PIERPONT GARDNER
President

OFFICE OF THE PRESIDENT
300 LAKESIDE DRIVE
OAKLAND, CALIFORNIA 94612-3550

September 21, 1989

CHANCELLORS

Dear Colleagues:

The University of California strives to create campuses that foster the values of mutual respect and tolerance and are free from discrimination based on race, ethnicity, sex, religion, sexual orientation, disability, and other personal characteristics.

I am issuing the attached addition to the Student Conduct Policy as part of our continuing effort to protect these values. In doing so, I am also reaffirming that the University is a community committed to the free exchange of ideas and the full protection of free expression.

Nothing in this Policy is intended to limit the protection of free speech accorded students by law and University policy. The Policy recognizes, however, that words can be used in such a way that they no longer express an idea, but rather are used to injure and intimidate, thus undermining the ability of individuals to participate in the University community.

This Policy is effective immediately. In accordance with established procedures, any additional campus regulations made pursuant to the Policy must have my approval before they can be implemented.

Sincerely,

David P. Gardner

David Pierpont Gardner

Attachment

cc: Laboratory Directors
Members, President's Cabinet
Director Rogin
Principal Officers of The Regents

University of California
Office of the President
September 21, 1989

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UNIVERSITYWIDE STUDENT CONDUCT: HARASSMENT POLICY

Addition to Section 51.00, Student Conduct, Policies Applying to Campus Activities, Organizations, and Students (Part A)

51.00 Student Conduct

Chancellors may impose discipline for violation of University policies or campus regulations. Such violations include the following types of misconduct:

* * *

51.xx* The use of "fighting words" by students to harass any person(s) on University property, on other property to which these policies apply as defined in campus implementing regulations, or in connection with official University functions or University-sponsored programs.

"Fighting words" are those personally abusive epithets which, when directly addressed to any ordinary person are, in the context used and as a matter of common knowledge, inherently likely to provoke a violent reaction whether or not they actually do so. Such words include, but are not limited to, those terms widely recognized to be derogatory references to race, ethnicity, religion, sex, sexual orientation, disability, and other personal characteristics. "Fighting words" constitute "harassment" when the circumstances of their utterance create a hostile and intimidating environment which the student uttering them should reasonably know will interfere with the victim's ability to pursue effectively his or her education or otherwise to participate fully in University programs and activities.

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* The subsection will be numbered when incorporated in Policies Applying to Campus Activities, Organizations, and Students (Part A).

Chapter UWS 17

STUDENT NONACADEMIC DISCIPLINARY PROCEDURES

UWS 17.01 Policy statement
UWS 17.02 Definitions
UWS 17.03 Right to petition for readmission
UWS 17.04 Effect of discipline within the university system
UWS 17.05 Systemwide disciplinary authority
UWS 17.06 Offenses defined
UWS 17.07 Disciplinary procedure
UWS 17.08 Student conduct hearing tribunal: campus option
UWS 17.09 Discipline involving suspension or expulsion
UWS 17.10 Appeal to the board of regents
UWS 17.11 Intermediate appeals: campus option
UWS 17.12 Temporary suspension
UWS 17.14 Notice to students

Note: See ch. UWS 14 for student academic disciplinary procedures.

UWS 17.01 Policy statement. The board of regents of the university of Wisconsin system adopts the following policy on the standards and procedures for student discipline in the university system, acknowledging both the need to preserve the orderly processes of the university with regard to its teaching, research, and public service missions, as well as the need to observe the student's procedural and substantive rights.

History: Cr. Register, February, 1976, No. 242, eff. 3-1-76.

UWS 17.02 Definitions. (1) "Chancellor" means the chancellor or designee.

(2) "Investigating officer" means investigating officer or designee.

(3) "Student," for the purpose of this chapter, means any person who is registered for study in any institution in the university for the current academic period. A person shall be considered a student during any period which follows the end of an academic period which the student has completed until the last day for registration for the next succeeding academic period or until 14 calendar days have elapsed after the commencement of classes for the next succeeding academic period, whichever occurs first.

(4) "Disciplinary sanction" or "sanction" means any action affecting the status of an individual as a student which is taken by the university in response to student nonacademic misconduct. The term shall include probation, resignation or leave for misconduct, suspension or expulsion, written reprimand, denial of particular university privileges, and other less severe actions not enumerated herein. Disciplinary sanctions shall not include cut-off or revocation of a student's financial aids; however, this shall not be interpreted as precluding the individual operation of rules or standards governing eligibility for student financial aid under which the imposition of a disciplinary sanction could result in disqualification of the student for financial aid. Each institution is authorized to adopt a more explicit listing of sanctions and actions which is consistent with the provisions of this section.

(5) "Probation" means that the student is permitted to remain enrolled in the university only upon condition that he/she comply with all university rules or regulations or with other standards of conduct which the student is directed to observe for the duration of the period of the probation and which may include loss of student privileges except those of attending classes and writing examinations. Probation may not exceed

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2 semesters in duration for any given misconduct, except that violation of probationary conditions shall be cause for extension of the probation for more than 2 additional semesters or for suspension or expulsion.

(6) "Suspension" means a temporary loss of student status for a specified period of time, not to exceed 2 years, with resultant loss of all student rights and privileges. Upon completion of suspension, the student shall have the same standing to re-enroll as he she would have had if no suspension had been imposed.

(7) "Expulsion" means termination of student status with resultant loss of all student rights and privileges.

(8) "Instructor" for the purposes of this chapter means the faculty member who has responsibility for the overall conduct of a course and ultimate responsibility for the assignment of the grade for the course.

(9) "Institution" means any university, or an organizational equivalent designated by the board.

(10) "Days" means calendar days.

(11) "Intentional conduct" means conduct which the student knew or reasonably should have known would result in conduct prohibited by this chapter.

(12) "Members of the university community" means students and employes of the university.

History: Cr. Register, February, 1976, No. 242, eff. 3-1-76; am. (4), Register, June, 1977, No. 258, eff. 7-1-77; am. (4), r. (8), renum. (9) and (10) to be (8) and (9), Register, February, 1989, No. 398, eff. 3-1-89; am. (1), (4) and (9), cr. (10), (11) and (12), Register, August, 1989, No. 404, eff. 9-1-89.

UWS 17.03 Right to petition for readmission. A student who has been expelled or suspended may petition for readmission. The petition must be in writing and directed to the chancellor of the institution which initiated the charges for which the student was suspended or expelled. Such petition may not be filed before the expiration of one year from the date of the final determination in expulsion cases, or before the expiration of one-half of the suspension period in suspension cases. The chancellor shall after consultation with the elected committee which serves as the faculty's executive arm and with the elected officers of the principal student organization, adopt procedures for determining whether such petitions will be granted or denied.

History: Cr. Register, February, 1976, No. 242, eff. 3-1-76.

UWS 17.04 Effect of discipline within the university system. Suspension or expulsion shall be systemwide in effect. A student who is suspended or expelled from one institution in the university of Wisconsin system may not enroll in another institution in the system unless the suspension has expired by its own terms or one year has elapsed after the student has been suspended or expelled.

History: Cr. Register, February, 1976, No. 242, eff. 3-1-76.

UWS 17.05 Systemwide disciplinary authority. The investigating officer for the institution at which a student was enrolled at the time that acts in violation of this chapter were alleged to have been committed by the student shall have authority to institute disciplinary proceedings against such student, notwithstanding that the institution against which the acts were alleged to have been committed is not the same institution at which the student was enrolled at the time of the commission of such acts.

History: Cr. Register, February, 1976, No. 242, eff. 3-1-76.

UWS 17.06 Offenses defined. The university may discipline a student in nonacademic matters in the following situations.

(1) For intentional conduct which constitutes a serious danger to the personal safety of other members of the university community or guests. In order to illustrate the types of conduct which this paragraph is designed to cover, the following examples are set forth. These examples are not meant to illustrate the only situations or types of conduct intended to be covered.

(a) A student would be in violation if he or she attacked or otherwise physically abused, threatened to physically injure, or physically intimidated a member of the university community or a guest because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.

(b) A student would be in violation if he/she attacked or threw rocks or other dangerous objects at law enforcement personnel whose services had been retained or called for to protect members of the university community or university property, or if he/she incited others to do so when he/she knew or reasonably should have known that such conduct would result.

(c) A student would be in violation if he/she sold or delivered a controlled substance as defined by the Wisconsin Uniform Controlled Substance Act (ch. 161, Stats.) or if he/she possessed a controlled substance with intent to sell or deliver. For the purposes of this section "delivery" shall be defined as a delivery prohibited by ch. 161, Stats.

(d) A student would be in violation if he/she removed, tampered with, or otherwise rendered useless university equipment or property intended for use in preserving or protecting the safety of members of the university community such as fire exit signs, extinguishers, alarms, or hoses, first aid equipment, or emergency telephones, or if he/she obstructed or caused to be inoperable fire escape routes such as stairwells or elevators.

(2) (a) For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets, other expressive behavior or physical conduct intentionally:

1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and

2. Create an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity.

(b) Whether the intent required under par. (a) is present shall be determined by consideration of all relevant circumstances.

(c) In order to illustrate the types of conduct which this subsection is designed to cover, the following examples are set forth. These examples

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are not meant to illustrate the only situations or types of conduct intended to be covered.

1. A student would be in violation if:

a. He or she intentionally made demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or "jokes"; and

b. His or her purpose in uttering the remarks was to make the educational environment hostile for the person to whom the demeaning remark was addressed.

2. A student would be in violation if:

a. He or she intentionally placed visual or written material demeaning the race or sex of an individual in that person's university living quarters or work area; and

b. His or her purpose was to make the educational environment hostile for the person in whose quarters or work area the material was placed.

3. A student would be in violation if he or she seriously damaged or destroyed private property of any member of the university community or guest because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.

4. A student would not be in violation if, during a class discussion, he or she expressed a derogatory opinion concerning a racial or ethnic group. There is no violation, since the student's remark was addressed to the class as a whole, not to a specific individual. Moreover, on the facts as stated, there seems no evidence that the student's purpose was to create a hostile environment.

(3) For intentional conduct that seriously damages or destroys university property or attempts to seriously damage or destroy university property.

(4) For intentional conduct that obstructs or seriously impairs or attempts to obstruct or seriously impair university-run or university-authorized activities on any campus, including activities either outdoors or inside a classroom, office, lecture hall, library, laboratory, theater, union, residence hall, or other place where a university-run or university-authorized activity is carried on. The kind of intentional conduct referred to is conduct which by itself or in conjunction with the conduct of others prevents the effective carrying on of the activity—a result which the student knew or reasonably should have known would occur. In order to illustrate types of conduct which this paragraph is designed to cover, the following examples are set out. These examples are not meant to illustrate the only situations or types of conduct intended to be covered.

(a) A student would be in violation if he/she participated in conduct which he/she knew or should have known would prevent or block physical entry to, or exit from, a university building, corridor, or room to anyone apparently entitled to enter or leave in connection with a university-run or university-authorized activity.

(b) A student would be in violation if, in attending a speech or program on campus sponsored by or with permission of the university, he/she engaged in shouted interruptions, whistling, derisive laughter, or other means which by itself or in conjunction with the conduct of others prevented or seriously interfered with a fair hearing of the speech or program, under circumstances where the student knew or reasonably should have known this would occur.

(c) A student would be in violation if in a classroom he she used techniques similar to those specified in the preceding paragraph, or filibuster-type tactics or other tactics, which by themselves or in conjunction with the conduct of others, prevented or seriously interfered with the carrying on of the teaching and learning process, under circumstances where the student knew or reasonably should have known this would occur.

(d) A student would be in violation if he/she intentionally obstructed a university official or employe engaged in the lawful performance of his/her duties.

(e) A student would be in violation if he or she removed pages from library books or parts of other materials or caused books or materials to be unavailable for use by others by removing them from their proper place without proper authorization or by hiding them in the library so that they are not available in the usual manner to persons wishing to use them.

(5) For unauthorized possession of university property or property of another member of the university community.

(6) For acts which violate the provisions concerning parking, traffic, I.D. cards, university keys, drugs, smoking in unauthorized places, carrying firearms, unauthorized peddling, unauthorized use of sound-amplifying equipment, and other subjects covered by the published University of Wisconsin System Administrative Code (ch. UWS 18).

(7) For making a knowingly false statement, either orally or in writing, to any university employe or agent on a university-related matter.

History: Cr. Register, February, 1976, No. 242, eff. 3-1-76; r. (2), renum. (1) and (1) (a) to (e) to be (intro.) and (1) to (6), Register, February, 1989, No. 398, eff. 3-1-89; am. (intro.), renum. (1), (2) (intro.), (a), (b) and (c), (3), (4), (5) and (6) to be (3), (1) (intro.), (b), (c) and (d), (4), (5), (6) and (7) and am. (1) (intro.), cr. (1) (a) and (2), Register, August, 1989, No. 404, eff. 9-1-89.

UWS 17.07 Disciplinary procedure. (1) INVESTIGATING OFFICER. The chancellor of each institution, after consultation with the elected committee which serves as the faculty's executive arm and with the elected officers of the principal student organization, shall designate a person as "investigating officer" who shall investigate cases of student conduct alleged to be in violation of s. UWS 17.06. Where it appears that a violation has occurred, the investigating officer shall proceed in accordance with the provisions of this chapter.

(2) FORMAL ADJUDICATION. If the maximum sanction sought by the investigating officer includes suspension or expulsion, the procedures in s. UWS 17.09 shall apply and the investigating officer shall cause a statement of charges to be prepared and served upon the student involved. The statement of charges shall contain:

(a) A concise summary—giving dates, time, place, and events—of the facts or conduct on which the charge is based.

(b) A citation to and quotation from the rule(s) alleged to have been violated.

(c) A statement of the maximum penalty sought by the investigating officer.

(d) An explanation of the consequences of failure to answer the statement of charges.

(e) Statements as to whether the university will or will not be represented by counsel and that the student may be represented by a person of his/her choice, including legal counsel, at his/her own expense.

(f) A copy of this chapter.

(3) INFORMAL ADJUDICATION. (a) The chancellor shall, after consultation with the elected committee which serves as the faculty's executive arm and with the elected officers of the principal student organization, establish institution regulations for an informal system of adjudication for cases in which the maximum penalty sought by the investigating officer does not include suspension or expulsion except that if adjudication in this manner would result in disqualifying the student for financial aids, the procedures in s. UWS 17.09 shall apply. The informal system shall include the following and such other provisions as are not inconsistent with this chapter:

1. Representation of the student by a person of his or her choice, including legal counsel, at his/her own expense,

2. Written notice to the student of the offense with which he/she is charged, the facts or conduct on which that charge is based, and the penalties which may possibly be imposed,

3. Advance written notice of and an opportunity for a hearing at which the evidence against the student shall be reviewed and at which the student shall have an opportunity to present evidence and argument, including a written statement, to refute the charge, and

4. A written decision which shall include findings of fact and conclusions. The procedures shall also provide for an appeal of the disciplinary decision within the institution.

(b) If, during informal adjudication, the investigating officer concludes that suspension or expulsion should be sought rather than a lesser sanction, the investigating officer may cause a statement of charges to be served upon the student in accordance with sub. (2), in which event the procedures in s. UWS 17.09 shall apply.

(4) SETTLEMENT. Nothing contained in this chapter shall prevent the student, during an investigation of alleged misconduct, during informal adjudication, or after a statement of charges has been served but prior to a hearing provided in accordance with s. UWS 17.09, from submitting a written resignation from the university.

(a) In the event of such resignation, the investigating officer shall impose such sanction as he deems appropriate consistent with the statement of charges; provided, however, the student may, within 10 calendar days after receiving notice of the imposition of such sanction, request a hearing as provided by s. UWS 17.07.

(b) Nothing contained in this chapter shall limit the right of the university and the student during an investigation of alleged misconduct, during informal adjudication, or after a statement of charges has been served, to agree to a disciplinary sanction if the student agrees not to contest the charges (pleads "no contest"). Any such agreement shall be reduced to writing which, when signed by the student, shall conclude the case.

(5) RIGHTS AND PRIVILEGES. Whenever charges or appeals under this chapter are pending, a student under charges, unless temporarily suspended pursuant to s. UWS 17.12, shall continue to have the same rights and privileges accorded other students. However, grades or diplomas may be withheld pending final determination of the charges; a current transcript shall be issued at the request of the student, but it may contain the notation "Disciplinary Charges Pending" on the face thereof.

(6) SERVICE OF NOTICE OR DECISIONS. Each student shall be responsible for maintaining on file with the office specified by each institution current school and permanent home addresses. Notification of these addresses shall be in writing.

(a) For service of a statement of charges under sub. (2) and of actions taken pursuant to s. UWS 17.09, copies shall be served in person or by certified, return-receipt-requested mail to both the student's institution and permanent home address. Where service is by mail, the date of service shall be the second day after the day of mailing.

(b) For informal adjudications pursuant to sub. (3), correspondence and notices may be served in person or by mail to the student's institution address. Where service is by mail, the date of service shall be the second day after the day of mailing.

History: Cr. Register, February, 1976, No. 242, eff. 3-1-76; am. (1), Register, February, 1989, No. 398, eff. 3-1-89.

UWS 17.08 Student conduct hearing tribunal: campus option. The chancellor shall, after consultation with the elected committee which serves as the faculty's executive arm and with the elected officers of the principal student organization, adopt regulations providing for the establishment of a student conduct hearing tribunal which may be constituted in one of 2 manners as chosen by the student charged:

(a) A hearing examiner appointed by the chancellor upon the filing of charges under s. UWS 17.07(2) asking suspension or expulsion. The hearing examiner shall be appointed from among qualified personnel of the various state agencies or other qualified residents of the state with experience in conducting hearings. If an examiner is an employe of a state agency other than the university, his/her appointment must be approved by the head of the agency by which he/she is regularly employed and the university shall reimburse such agency for the salary of the examiner and shall pay expenses incidental to his/her duties for the university. The examiner remains the employe of the agency by which he she is regularly employed. The appointment of the hearing examiner from other state agencies shall be in compliance with ss. 16.24 and 20.901, Stats. (1971). If the examiner is not an employe of a state agency other than the university, appropriate arrangements for compensation and reimbursement for expenses shall be made by the chancellor; or

(b) A student conduct hearing committee with a membership of at least 3 persons some of whom shall be students whose presiding officer shall be appointed by the chancellor. At any hearing held pursuant to due notice the presiding officer shall constitute a quorum.

(2) Institutional regulations adopted under this section shall provide that, upon the filing of charges under s. UWS 17.07 (2) asking for suspension or expulsion, the student shall be offered the choice of having his/her case heard by a tribunal described by either sub. (1) (a) or (b) above. The student shall be informed in writing of his/her right to choose the type of tribunal at the time charges are filed. At the time a request for a hearing is made under s. UWS 17.09 (1), the student shall also notify the chancellor of his/her choice; in the event timely notice is not received from the student, the chancellor shall decide which choice shall be used for adjudication of the case.

History: Cr. Register, February, 1976, No. 242, eff. 3-1-76.

UWS 17.09 Discipline involving suspension or expulsion. (1) A student charged in accordance with s. UWS 17.07 (2) has 10 calendar days from the day of service to request a hearing in accordance with this section. The request for a hearing shall be in writing directed to the chancellor and shall also include an answer to the statement of charges which shall specifically admit, deny, or explain each of the facts alleged in the statement of charges unless the student is without knowledge in which case he/she shall so state, such statement being a denial. If an answer is filed which does not specifically admit, deny, or explain every allegation in the statement of charges, those allegations which are not admitted, denied, or explained shall be deemed denied. An answer which denies some or all of the allegations but which does not request a hearing shall be construed as a request for a hearing.

(2) If the student does not file an answer to the statement of charges in accordance with sub. (1), the allegations in the statement of charges shall be accepted as true and the university may proceed to expel, suspend, or impose other punishment on the student unless good cause to the contrary is shown. The sanction imposed may not exceed that specified in the statement of charges. Notice of such action shall be served on the student and become effective upon service in accordance with s. UWS 17.07 (6).

(3) When a request for a hearing is made, the case shall be referred by the chancellor to the student conduct hearing tribunal established in accordance with s. UWS 17.08. Notice of referral to a hearing tribunal shall be sent to the student. The student shall also be notified of the name and address of the person who will present the university's case to the tribunal.

(4) (a) *Hearing procedures.* In this section, "presiding officer" shall mean the hearing examiner appointed in s. UWS 17.08 (1) (a), or the presiding officer of the student conduct hearing committee, established in s. UWS 17.08(1)(b). "Tribunal" shall mean the hearing examiner appointed in s. UWS 17.08 (1) (a) or the student conduct hearing committee established in s. UWS 17.08 (1) (b).

(b) *Duties of the presiding officer.* 1. Take custody of the case file and papers.

2. Schedule hearings in accordance with these rules.

3. Issue subpoenas and administer oaths.

4. Rule upon offers of proof and receive relevant evidence.

5. Regulate the course of the hearing, dispose of motions, procedural matters or requests, and, if appropriate or necessary, order the removal of persons who unreasonably obstruct or impair the tribunal's proceedings in its presence, and/or if such persons are students, order the investigating officer to commence disciplinary proceedings.

6. Schedule filing of briefs and proposed findings by the student and the university.

7. Produce a summary of the evidence.

8. Take any other actions necessary to conduct the hearing.

(c) *Duties and powers of the tribunal.* Individual members of the tribunal:

1. May challenge any ruling by the presiding officer and may, by majority vote, overrule such ruling but such matters unless otherwise convenient should be decided in closed session.

2. Shall, by majority vote, render written findings of fact, decision, and disciplinary sanction which does not exceed that specified by the statement of charge.

3. May examine witnesses.

(d) *Evidence.* Evidence having reasonable probative value shall be admitted, but irrelevant, immaterial and unduly repetitious evidence shall be excluded. The presiding officer and the tribunal are not bound by common law or statutory rules of evidence.

(e) *Burden of proof.* The burden of proof shall be on the university to establish by a preponderance of the credible evidence that conduct violative of university rules occurred.

(f) *Record of the hearings.* A record of the testimony and a file of the exhibits shall be made of all hearings conducted in accordance with this section. Either party may, at its own expense, have the record transcribed.

(g) *Procedural rights of the students.* The students shall have the right to confront and cross-examine witnesses against him/her, the right to present evidence and to be heard on his/her own behalf, the right to be represented by counsel at his/her own expense, and the right to a transcript of the proceedings at his/her own expense.

(h) *Public hearings.* Hearings to receive evidence or hear argument shall be public unless the student whose case is being heard requests a closed hearing or the tribunal determines in extraordinary circumstances that it is necessary to hold a closed hearing, pursuant to s. 66.77 (3) (e), Stats., to avoid unduly damaging the reputatior of innocent persons. A record shall be made of the reasons for closing any hearing. The deliberations of the tribunal shall not be public.

(i) *Schedule of hearings.* The presiding officer shall schedule the hearing as expeditiously as possible. The hearing shall be held on the date scheduled, except for good cause shown.

(j) *Failure to proceed.* Failure of a party to proceed shall constitute default. The tribunal may either dismiss the charges, or, upon a prima facie showing, find that the student committed the conduct alleged.

(k) *Decision*. 1. The tribunal's decision shall be rendered in writing within 10 calendar days after the close of the hearing, or within 10 calendar days after a written transcript is available if one of the parties requests a transcript pursuant to par. (g), and shall consist of a summary of the evidence, findings of fact, decision, and specification of the disciplinary sanction which does not exceed that specified in the statement of charges.

2. The tribunal's decision shall be served on the student in accordance with s. UWS 17.07 (6) and on the chancellor's office.

3. The tribunal's decision shall become final 10 calendar days after service on the student unless a timely appeal is filed pursuant to s. UWS 17.10 or 17.11.

History: Cr. Register, February, 1976, No. 242, eff. 3-1-76.

UWS 17.10 **Appeal to the board of regents.** (1) The student or administration may appeal on the record to the committee on student discipline of the board of regents. Said appeal must be filed within 10 calendar days of service upon the party of the decision appealed from and shall consist of written exceptions to the decision's findings of fact, decision, or disciplinary sanction.

(2) Upon receipt of the appeal and written exceptions, the secretary of the board shall transmit the written exceptions to the chairman of the committee and shall cause the person with custody of the decision(s), file, exhibits, and transcript or recording of the hearing(s) to transmit them to the chairman of the committee.

(3) If exceptions are filed under sub. (1), the committe shall afford the parties an opportunity to file briefs and present oral argument.

(4) The committee shall render written findings of fact, decision, and disciplinary sanction which does not exceed that specified by the statement of charges.

(5) The committee's decision shall become final upon service upon the student in accordance with s. UWS 17.07 (6).

(6) The board of regents reserves jurisdiction to review, upon its own motion, any disciplinary action against a student.

History: Cr. Register, February, 1976, No. 242, eff. 3-1-76.

UWS 17.11 **Intermediate appeals; campus option.** (1) The chancellor of each institution is authorized, but not required by this section, after consultation with the elected committee which serves as the faculty's executive arm and with the elected officers of the principal student organization, to establish appellate tribunals and procedures which are not inconsistent with this chapter for adjudication of appeals from decisions rendered in accordance with s. UWS 17.09. Such tribunals may include review by an all-student, student-faculty, or all faculty committee, and/or review by the chancellor.

(2) An appeal to an appellate tribunal must be filed within 10 calendar days of service upon the party of the decision appealed from and shall consist of written exceptions to the findings of fact, decision, or disciplinary sanction.

(3) The parties shall have an opportunity to file briefs and present oral argument. Appeals shall be heard as soon as practicable but no later than 7 calendar days after the written exceptions are filed in accordance with sub. (2).

(4) A record shall be made of appellate tribunal proceedings.

(5) Appellate decisions shall be rendered within 5 calendar days of the hearing and shall consist of a summary of the evidence, written findings of fact, decision, and disciplinary sanction which shall in no event be more severe than the sanction imposed by the student conduct hearing tribunal.

(6) Appellate decisions shall become final 10 calendar days after service upon the student in accordance with s. UWS 17.07 (6) unless a timely appeal is filed either under this section, if further appeal is available, or under s. UWS 17.10.

(7) The student shall have the right at any time to appeal to the regents in accordance with s. UWS 17.10. Intermediate appellate proceedings shall be terminated immediately upon the appellate tribunal's receipt of notice from the student that an appeal to the regents has been filed.

History: Cr. Register, February, 1976, No. 242, eff. 3-1-76.

UWS 17.12 **Temporary suspension.** (1) A student may be temporarily suspended by the chancellor pending final action on the charges against him/her if his/her continued presence on campus would constitute a potential for serious harm to himself/herself or to the safety of other members of the university community or of university property. Except as otherwise provided in sub. (3), the student shall be afforded an opportunity for a preliminary hearing prior to imposition of the temporary suspension. In order to illustrate the types of conduct which warrant temporary suspension, the following examples are set forth. These examples are not meant to illustrate the only situations or types of conduct intended to be covered.

(a) A student who was arrested and charged with possession of controlled substances with intent to deliver was discovered to have large quantities of LSD, heroin, methamphetamines, or barbiturates in his/her university dormitory room.

(b) A student who was arrested for throwing a fire bomb into a university classroom building.

(c) A student who assaulted another student in the student union was arrested for engaging in conduct regardless of human life.

(d) A student whose behavior was judged by a psychiatrist to be psychotic, posing a threat to safety of himself/herself or others.

(2) Before a temporary suspension may be imposed, the chancellor shall make an initial evaluation of the reliability of the information received and make such further investigation as circumstances permit. If the chancellor concludes that the conduct alleged warrants temporary suspension of the student, the chancellor shall notify the student of an intention to temporarily suspend the student and, at the earliest practicable opportunity, provide the student with an opportunity to be heard.

(3) The chancellor shall maintain records of all attempts to notify the student in accordance with sub. (2), and, if all reasonable efforts to notify the student are unsuccessful, the chancellor may impose the temporary suspension without a preliminary hearing, provided, however, attempts to notify the student continue, and the student is afforded a preliminary hearing at the earliest practicable opportunity.

(4) (a) The preliminary hearing shall be held as soon as practicable.

(b) At the hearing, the student shall be given a statement of charges as required by s. UWS 17.07 (2) (a) and (b) and a summary of the reason(s) for concluding that the alleged conduct warrants temporary suspension.

(c) The issues shall be limited to consideration of the reliability of the evidence against the student and whether the alleged conduct warrants temporary suspension.

(d) The chancellor's decision may be rendered orally but shall be confirmed in writing, as soon as practicable. The decision must be supported by credible evidence which is sufficient to indicate that there is probable cause to believe that the student engaged in the alleged conduct and that such conduct warrants temporary suspension.

(5) The hearing on the charges as required by s. UWS 17.09 shall be commenced not later than 15 calendar days after the imposition of the temporary suspension unless the student requests a delay of the hearing and continuation of the temporary suspension until a later date.

History: Cr. Register, February, 1976, No. 242, eff. 3-1-76.

UWS 17.13 **Procedures for academic misconduct. History**: Cr. Register, February, 1976, No. 242, eff. 3-1-76; r. Register, February, 1989, No. 398, eff. 3-1-89.

UWS 17.14 Notice to students. Each institution shall publish and make freely available to students, a copy of the foregoing UW system disciplinary code together with an appendix reprinting the UW system administrative code, any amendments to these 2 codes that are made after the board of regents adoption of a disciplinary code, and any provisions that have been adopted by the particular campus pursuant to the campus options allowed by this disciplinary code, and any other supplementary provisions not inconsistent with this code.

History: Cr. Register, February, 1976, No. 242, eff. 3-1-76.

Policing Prejudice

Boards that seek to regulate unacceptable behavior through the use of student conduct codes face possible legal snarls. But Wisconsin's regents think it's worth the risk.

(Reprinted with Permission)

By Laurence A. Weinstein

A DISTURBING RISE in racial incidents and other forms of harassment on campus has prompted many colleges to adopt conduct codes that prohibit discriminatory harassment. Last June, the University of Wisconsin Board of Regents, of which I am a member, passed such a code by a vote of 12 to 5.

Because student conduct rules are a part of the state administrative code in Wisconsin, any changes in those rules made by the board of regents must be reviewed by the legislature prior to becoming effective. Committees from each house of the legislature reviewed the changes at a joint public hearing last July. The rules survived this inspection and became effective on September 1.

Because many institutions are struggling with the tricky issue of regulating discriminatory harassment, it may be instructive to look at the Wisconsin rule change and discuss the arguments governing boards are likely to hear.

■ The road to diversity

In spring 1988, the University of Wisconsin System Board of Regents adopted "Design for Diversity," a multifaceted plan that addressed the needs of minority and disadvantaged students and minority faculty. The plan covered the following issues:

- student access and retention;
- environment on the campuses;
- financial aid;
- cooperative efforts with the K-12 system; the vocational, technical, and adult education system; and the private sector; and
- teacher education initiatives.

In addition, we authorized appointment of a full-time staff person to report directly to the president of the system on implementation of the plan.

One of the underlying premises of "Design for Diversity" is that the University of Wisconsin System "has a particular responsibility to provide . . . a positive multicultural environment in each of its institutions for the benefit of students." To do that, the board believed it might have to change the student conduct code, which was 13 years old and did not address physical or verbal abuse by students based on race, creed, color, gender, religion, disability, sexual preference, national origin, ancestry, or age.

The board held a systemwide workshop to discuss possible changes in the code, and in October 1988, the regents unanimously adopted a policy statement and guidelines for making such changes. The words of the policy statement are important: "It is the policy of the Board of Regents of the University of Wisconsin System that racist and other discriminatory conduct toward students . . . will not be tolerated . . . ." Such conduct is "inconsistent with the efforts of the [university] to foster an environment of respect for the dignity and worth of all members of the university community . . . . All such episodes are harmful to the individuals involved and diminish the university community as a whole."

We asked each campus to submit proposals that would bring the student conduct code into conformity with the policy guidelines. A task force studied the various campus proposals and submitted recommended changes to the board of regents in March 1989.

■ Protecting free speech

From the regents' point of view, the issue was how to help create an environment that would give each student—regardless of race, creed, color, sex, religion, disability, sexual orientation, national origin, ancestry, or age—equal access to campus educational opportunities. It was clear to a majority of regents that students who were harassed because of protected characteristics were deprived of that equal opportunity. At the same time, the regents did not want to tread on students' First Amendment rights of free speech.

To protect those rights, the regents asked for the counsel of three eminent First Amendment scholars of the law school at the University of Wisconsin at Madison. Interestingly enough, they each approach the First Amendment quite differently, but they all managed to agree on a draft of proposed rule changes. The proposal was, in their view, likely to withstand constitutional scrutiny.

After hearing the discussion of the legal scholars in March 1989, the board of regents heard testimony at its April and June meetings. After the April meeting, the board voted 8 to 7 to proceed with administrative rulemaking to implement the proposal. At the June meeting, the board held the public hearing required prior to approval of an administrative rule. The board heard favorable testimony from the system president, campus chancellors, the UW-Madison faculty committee, student organizations, a member of the Wisconsin legislature, and the NAACP, among others.

Opposing speakers included the American Civil Liberties Union, a member of the Wisconsin legislature, and a student. At the conclusion of the hearing, the board voted 12 to 5 to adopt the policy.

The ACLU has threatened to challenge the rule in the courts, but at the time of publication of this article, the group had not taken any formal action. [See the related story beginning on the next page.] In a letter to the board, the legislative committees asked for quarterly reports and an annual summary showing the number and types of complaints, dispositions, and recommendations for modification. The committees also requested that the board hold a public hearing after conclusion of the 1990 school year.

What the changes mean

The changes to the code address both physical and verbal conduct. A student would be in violation if "... he or she attacked or otherwise physically abused, threatened to physically injure, or physically intimidated a member of the university community or a guest because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age." This provision did not receive any objection, except for one member of the legislature who claimed that Wisconsin's criminal code already dealt with physical conduct. However, the state's criminal code does not give the university any authority to discipline a student.

The provision of the conduct code that stirred up the major debate was that which deals with verbal conduct. It provides that students may be disci-

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Codes designed to combat racism Might trip over the First Amendment

By Jana Dozier

GOOD INTENTIONS do not always make good policy. That's the hard truth the University of Michigan had to learn when it attempted to protect students from discriminatory harassment. Last September, the university's antidiscrimination policy was struck down in federal district court after being challenged by the American Civil Liberties Union (ACLU). The judge ruled the policy was too vague and overly broad in its description of what constitutes offensive speech.

The board of regents decided not to appeal the decision and instead sent university officials back to the drawing board to draft an interim policy that would address the court's concerns and serve as a yardstick until a permanent policy could be formed.

Wono Lee, a university spokesman, says no one has formally challenged the interim policy. "The revision took into consideration the vagueness issue and made the definition [of discriminatory speech] more specific," says Lee. "What we are trying to do is protect freedom of speech and also come up with something that addresses the racial incidents."

A delicate balance

University officials were trying to do just that in drafting the original policy. Although no single incident prompted the policy, officials were especially alarmed about racist jokes aired on the campus radio station. In attempting to regulate such incidents, however, they realized they were treading on slippery constitutional ground. When he announced the policy in spring 1988, interim President Robben Fleming said the rules "seek to strike a balance between free speech, the rights of individuals to be free from injury caused by discrimination, and the university's duty to protect the educational process."

The original code stated that "any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status and that involves an express or implied threat to an individual's academic efforts, participation in University-sponsored extracurricular activities, or personal safety" is subject to discipline. In addition, the policy set varying standards depending on whether the actions took place in a public forum, educational or academic centers, or university housing.

The ACLU brought suit on behalf of an anonymous graduate student who said the policy made him reluctant to discuss controversial ideas in the classroom. The student, a behavioral psychologist, said some of his classmates regarded his theories as racist or sexist, and that under the Michigan policy, his ideas could be conplined for "racist or discriminatory comments, epithets, or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets, other expressive behavior, or physical conduct intentionally:

"1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age of the individual or individuals; and

"2. Create an intimidating, hostile, or demeaning environment for education, university-related work, or other university-authorized activity."

In order, therefore, for the conduct to violate the code, it must meet a fourfold test: (1) It must be intentional; (2) it must be directed at an individual; (3) it must demean the individual on the basis of a protected characteristic; and (4) it must create an "intimidating, hostile, or demeaning environment."

■ Voices of opposition

The same opposing arguments were heard at all four hearings:

■ *1. The rule would violate the free-speech provisions of the First*

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sidered discriminatory harassment. The Washtenaw County chapter of the ACLU charged that the policy didn't give adequate notice of the kinds of behavior that are prohibited.

U.S. District Judge Avern Cohn agreed, saying that the policy was so vague that "persons of common intelligence must guess at its meaning."

To remedy this, the interim policy now states: "After a thorough review of the issue, the University of Michigan has determined that it needs to intervene in speech when a student intentionally uses racial, ethnocentric or sexual invectives, epithets, slurs, or utterances directly to attack or injure another individual, rather than express or discuss an idea, ideology, or philosophy. Such attacks go beyond the boundaries of protected free speech."

■ "Fighting words" doctrine

This wording echoes the "fighting words" doctrine handed down by the Supreme Court, which exempts from protection speech intended to insult an individual, rather than to foster the free exchange of ideas.

Ironically, the original policy was set to expire on December 31, 1989, to be replaced by one that would include any needed changes. "We have always looked upon the concept of an antidiscrimination policy not as a rigid and static statement, but rather as a changing and dynamic one that would evolve as we studied its ramifications and gained experience in administering it," says Walter Harrison, Michigan's executive director of university relations.

Wono Lee, the university spokesman, says officials hoped to have the permanent policy in place by January, but at the time of publication, it was still under review by advisory groups.

The University of Michigan's legal difficulties have not deterred other institutions from attempting to regulate racist or sexist behavior, as the accompanying article by Laurence A. Weinstein suggests. The University of Wisconsin has forged ahead with its own antidiscrimination policy, while keeping in mind the lessons learned in Michigan.

"Where Michigan stumbled on vagueness, our policy is more tightly and narrowly constructed," says James Sulton, special assistant to the president for minority affairs. "In our policy, not only must you commit the offense, but you must do it in a manner intended to create a hostile educational environment."

The Wisconsin policy grew out of its comprehensive "Design for Diversity" plan, which addresses the needs of minority students. "Our whole motivation in writing the policy was that we had to act to demonstrate that Design for Diversity was worth more than the paper it was printed on," says Sulton.

As for possible legal action from the ACLU, Sulton says the group has threatened to take action but so far has not. "My information is that they have retained an attorney to do that, but they are having trouble finding a plaintiff. The Michigan ACLU was much better prepared." ■

Jana Dozier is an associate editor of AGB Reports.

"Our rule does not prevent the exchange of ideas, but deals only with harassing speech of one student toward another."

Amendment to the U.S. Constitution.

There were variations on the free-speech argument: Where will it all end? What will be next? This argument was used by the ACLU, some regents, a member of the legislature, and Wisconsin newspaper editorial writers and clearly was the most commonly heard opposing argument.

The regents were assured by the law school faculty members that the First Amendment is intended to protect the exchange of ideas, but this protection does not necessarily extend to every form of speech. Our rule does not prevent the exchange of ideas, but deals only with harassing speech of one student toward another. The hurling of racial epithets does not impinge on First Amendment values or undermine the purposes of the First Amendment, because there is no possibility of the exchange of ideas.

■ *2. The rule was too vague; intent would be difficult if not impossible to prove; and therefore, the rule would either be too expensive to enforce, would create an administrative nightmare, or both.*

The rule provides that intent would be determined by considering all the relevant circumstances in each case. It is an issue for the finder of fact, not unlike the hundreds of other laws, both common and statutory, that require a finding of intent.

■ *3. The punishment for "bad words" was too harsh. A common argument: "You mean someone could be expelled for using a bad word?"*

Each campus has a procedure to discipline students. The student conduct code allows for punishment to run the gamut from reprimand to expulsion. The rule does not provide given punishments. These depend on the severity of the offense. Further, students are entitled to due process, which means facing their accusers and having a right to appeal.

■ *4. Because the rule is so narrowly drawn, it is only symbolic. There were three variations of this argument: The rule will not prevent discriminatory attitudes; it will raise false hopes among minority students; and it will divert our attention from the basic causes of discrimination.*

System President Kenneth A. Shaw pointed out that symbols are important in terms of the environment they establish. They can send the proper message—or the wrong one. It was also argued that laws can help affect attitudes. Last, "Design for Diversity" encompasses many other initiatives, but without a positive multicultural environment, minority students will not attend our campuses.

■ *5. The art and drama faculty of the Madison campus opposed the rule, because they were concerned it would have a chilling effect on classroom discussion and on artistic expression.*

A member of the law school faculty pointed out that artistic expression deals with society at large, while the rule deals with the conduct of an individual student toward another individual. In addition, a student's comments in a class, directed to a class, are not covered by the rule.

■ *6. The rule would damage the reputation of the university system.*

The purpose of the rule is to make the university more user-friendly.

■ *7. It was even argued that minority students would be the first to be punished.*

Although any student who violates the rule would be subject to sanctions, its clear intent is to protect minority and other students from discriminatory harassment.

■ Words of caution

Four important lessons may be learned from our experience in Wisconsin, and they may have relevance for other boards.

First, when formulating the rule, you must anticipate First Amendment arguments. Conferring with respected legal scholars early in the process is crucial, and legal counsel's presence and testimony at board meetings and public hearings is essential.

Second, our regents would not have passed the revised conduct code without strong, consistent, and publicly voiced support from the system administration, campus administrators, faculty governance bodies, and student organizations.

Third, I doubt the proposed rule would have survived the legislative process if the system's staff had not provided extensive briefings to the legislative leadership. The depth of knowledge of the committee chairs at the public hearings on this complex legal and public-policy issue was impressive.

Fourth, I am convinced that had the proposed code changes been a standalone document, they would not have received the support they did from the regents, campus administrators, or legislators. They were approved as a logical extension of "Design for Diversity" and one of the many ways in which it could be strengthened and implemented.

It is clear that despite extensive public debate, discussion, and analysis, there still exists substantial misperception about the application of the rule. Two recent incidents illustrate some of the misperceptions:

I received a telephone call from a member of the English faculty. He explained that he planned to teach a course in the history of racial slurs and other epithets and intended to list the course in the syllabus under the title, "Faggots, Niggers, Kikes—A History of Racial Slurs and Other Epithets." The purpose of this wording was to attract attention. His concern was that the title would violate the rule, because it might offend or demean some students. I explained that it would not be a violation because it would not be directed at an individual and would not have a demeaning intent.

Another misperception is illustrated by a recent editorial in a Madison newspaper that referred to the rule as "breezing through the University of Wisconsin Board of Regents and past a legislative review process. . . ." In fact, the rule change was months in the making, was the subject of many editorials and articles, two hearings before the regents and two before legislative committees, and was studied and publicly debated more extensively by the board of regents than almost any action it has taken.

Our challenge in the coming months will be to ensure that the rule is correctly understood by students, faculty, staff, and the public. ■

New York University School of Law

PROCEDURES FOR ADJUDICATING COMPLAINTS POSSIBLY JUSTIFYING FORMAL DISCIPLINE

Introduction

Pursuant to applicable New York University by-laws and disciplinary procedures, the faculty of the New York University School of Law adopts the following Rules for informal resolution of complaints and for cases of formal student discipline. The procedures described below are not exclusive, and are not intended to prevent any potential complainant from resolving a complaint by informal means (through, for instance, the offices of the Associate Dean of the J.D. Division, the Associate Dean of the LL.M. Division, the Assistant Dean for Placement and Student Affairs, or the Ombudsman) or to prevent the Dean from acting independently in cases of emergency.

I. PROCEDURES FOR INFORMAL RESOLUTION OF COMPLAINTS.

The procedures specified in Part I of the Rules govern cases subject to informal resolution. Participation in the meetings and referrals specified in the procedures in Part I, applicable to all members of the law school community, is voluntary.

A. Applicability.

Part I of the Rules provides the remedy for complaints which allege bias as defined immediately below.

Bias: verbal or physical conduct which denigrates any person or group of persons on the grounds of age, disability, ethnicity, gender, marital status, national origin, race, religion, or sexual orientation, and is likely to interfere with the ability of students to participate equally in the pursuit of an education and to enjoy the full freedom of the academic environment.

B. Initiation of Proceedings.

(1) When a complaint of bias, as defined in Paragraph A of this Part, is made to an Associate or Assistant Dean or Ombudsman, that person

(a) shall describe to the complainant the available means of informal resolution, which may include meetings between the complainant and respondent conducted by the Associate or Assistant Dean or Ombudsman and referral to the chair of the Committee on Bias and Harassment and

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(b) may conduct such meetings and make such referrals as the complainant requests.

(2) A matter referred or brought initially to the Committee on Bias and Harassment shall be subject to investigation and possible mediation in accordance with the procedures of that committee.

II. PROCEDURES FOR OFFENSES REQUIRING FORMAL DISCIPLINE.

The procedures specified in Part II of the Rules govern cases of formal student discipline. The procedures described below are not exclusive, and are not intended to prevent any potential complainant from resolving a complaint by the informal means described in the Introduction or in Part I.

A. Applicability.

The procedures are available for resolution of allegations of the following types of student misconduct, provided that the misconduct is alleged to have occurred on law school premises or in the course of law school business:

(1) Physical assault, intentional acts of physical violence, malicious injury to the property of others, conduct which intentionally or recklessly imperils the safety of any person or of law school premises, or threats to commit any of the above.

(2) Physically threatening or intimidating, or otherwise harassing, behavior which is overtly and intentionally directed towards a person or group of persons on grounds of ethnicity, gender, national origin, race, religion or sexual orientation.

(3) Sexual harassment: conduct, including sexual assault, that constitutes (a) an attempt, physically or verbally, through threats to coerce a person into a sexual relationship, or that subjects a person to sexual acts, reasonable fear of sexual acts, or sexually charged communications when the actor knows that the acts or communications are unwanted, or (b) encouragement of a person to participate in a sexual relationship through the promise of rewards or threats of penalties which the actor is able to promise or threaten by virtue of an authority conferred by the law school.

(4) Cheating, plagiarism, or forgery of academic documents with intent to defraud.

(5) Intentional disruption of a lecture hall, classroom, or any other premises used for academic purposes.

(6) Theft of library materials, or destruction of all or part of a library book or archival document.

(7) Intentional interference with access to lecture halls, classrooms, or academic offices.

(8) Intentional physical detention or restraint of a

student, instructor, staff member or administrator while that person is attempting to exercise law school duties.

B. Discipline Committee.

The discipline committee shall consist of six persons, four faculty chosen annually by the Dean and two students (as well as two student alternates who will participate when necessary to complete a hearing panel) chosen annually by the Student Bar Association. The Dean shall name the chair of the committee. Each formal charge shall be heard by a three-member panel, two faculty and one student, chosen by the chair of the committee.

C. Initiation of Proceedings.

A written complaint, signed by the complainant, must be filed with the chair of the discipline committee within one month of the alleged misconduct. (The term "complainant" should be read to include "complainants" in cases where more than one person joins the complaint. Similarly, "respondent" should be read to include "respondents" in cases where more than one student is accused in a complaint.) The chair, within five days of the receipt of the complaint, shall take one of the actions listed below. (The term "day" means Monday through Friday during term.)

(1) In those cases in which the identity of the perpetrator of the misconduct is unknown, the complaint shall be referred to the office of the Dean who will conduct or direct an investigation for the purpose of identifying the perpetrator. Within thirty days of the referral, the Dean shall communicate the status of the investigation to the chair of the committee and to the complainant.

(2) Dismiss the complaint, without prejudice to the complainant's right to amend and refile within fifteen days, as facially insufficient (providing a brief written notice of the action to the complainant and to the respondent).

(3) Refer the matter for informal resolution as specified in subparagraphs (a) through (e) of this paragraph:

(a) A complaint may be referred to an Associate Dean, to the Assistant Dean for Placement and Student Affairs, to the Ombudsman, or to an appropriate committee for investigation and mediation in accordance with the practice of the office of the Dean or Ombudsman or with the procedures of the committee.

(b) A complaint which is not resolved to the satisfaction of both the complainant and the respondent within ten days after referral pursuant to subparagraph (a) of this paragraph shall be returned to the chair of the discipline committee with a brief written explanation of the reasons for its return. This ten-day period may be extended with the agreement of the complainant and the respondent or by the Chair of the Discipline committee.

(c) Within five days of the return of the complaint to the chair of the discipline committee, the chair shall either proceed as provided by paragraph (3) below or dismiss the complaint on the ground that there is insufficient information to provide probable cause to believe that the respondent committed misconduct warranting formal discipline. (Brief written notice of this action shall be provided to the complainant and to the respondent.)

(d) Within five days of receipt of notice that the complaint has been dismissed pursuant to paragraph (c) above, the complainant may appeal the dismissal to the Dean. The committee chair will thereafter forward all documents regarding the complaint to the Dean. The Dean will either sustain the dismissal or return the complaint to the committee chair with the direction to proceed pursuant to paragraph (4) below.

(4) Refer the matter to a three-member hearing panel. A complaint becomes a formal charge only upon referral by the chair to the hearing panel.

D. Confidentiality.

The fact of the filing of a written complaint, and all proceedings thereon, shall be kept confidential by the members of the discipline committee, by the members of any committee to which a complaint if referred, and by the Dean and all faculty, administrators, staff and students who have official responsibility under these Rules, unless all parties agree that the proceeding, or a part of it, should be made public. The only exceptions to the confidentiality requirement are those specified at paragraphs F(8)-(10) and H.

E. Pre-hearing Proceedings on a Formal Charge.

(1) Within five days of the charge's referral to the hearing panel, the committee chair shall serve the charge upon the respondent and shall provide both the complainant and the respondent with the names of the three members of the hearing panel.

(2) The respondent shall have twenty days from receipt of the charge to submit a written answer to the committee chair. The committee chair shall serve the answer on the complainant and forward copies of the charge and the answer to the hearing panel.

F. Hearing Proceedings.

(1) Timing of hearing: The hearing shall be held within two weeks of service on the complainant of the respondent's answer unless (a) the respondent waives a hearing or (b) a party shows good cause why the hearing should be postponed or (c) both parties agree to a postponement.

(2) No compulsion of testimony or documents: The hearing panel does not have the power to compel testimony or production

of documents. The faculty strongly urges members of the law school community to cooperate with requests, from the hearing panel or from a party, for testimony and production of documents.

(3) Quorum requirement: All three members of a panel shall be present at the hearing. All actions shall be by majority vote. When the committee's chair is not a panel member, the participating members shall designate a chair of the hearing panel.

(4) Challenges to members: Any hearing panel member may recuse himself or herself sua sponte from the hearing of a particular charge. Any party may request that a hearing panel member disqualify himself or herself from hearing a charge. Such a request will be resolved by the hearing panel. The complainant or complainants may challenge one member of the hearing panel peremptorily, as may the respondent or respondents. Each side has the right to one peremptory challenge.

(5) Assistance of advisors: Each party has the right to be aided or represented by an advisor at every stage of the proceedings. The advisor may be a law school student, staff member, faculty member, or an advisor from outside the law school community.

(6) Burdens, presentation, and standard of proof: The rules of evidence are not binding on the hearing panel. The parties may present written and oral evidence. The chair of the hearing will determine the mode and order of the parties' presentations. The parties or their advisors may examine and cross-examine each witness, either by putting questions directly to the witness or by asking questions through members of the hearing panel. The method of questioning is determined by the hearing panel, any may be altered by the hearing panel at any time during the hearing. The complainant has the burden of going forward and the burden of proof. The standard of proof is clear and convincing evidence.

(7) Record of proceedings: The proceedings shall be recorded on audio tape or by such other method (including videotape or stenographic record) as the hearing panel may direct.

(8) Report of the hearing panel: The hearing panel shall make a written report which sets forth findings of fact, and the hearing panel's conclusions and the reasons therefor, within ten days of the completion of the hearing. Copies of the report shall be served on the complainant, the respondent, and the Dean.

(9) Action after dismissal of charge: If the hearing panel dismisses the charge, the record shall be kept confidential except to the extent that disclosure may be required by law. If the hearing panel determines that the charge was filed maliciously, that determination shall be included in the report made pursuant to the provisions of paragraph F(8) above, in any report on the proceedings which is required by bar examiners, and in the file of the complaining student.

(10) Action after sustaining of charge: If the charge is sustained in any respect, the hearing panel's report shall state

what entry is to be made in the respondent student's file and shall contain a recommendation that the Dean impose any of the following sanctions, as more fully described in Section IIIA of the University Student Disciplinary Procedures:

a. Warning.
b. Censure.
c. Disciplinary probation.
d. Restitution.
e. Monetary fine.
f. Suspension.
g. Dismissal.

G. Appeals.

All appeals from the hearing panel's action after a hearing shall be to the Dean. The complainant may appeal only from a determination, pursuant to paragraph F(9), that the charge was filed maliciously. The respondent may appeal from any adverse determination pursuant to paragraph (10). Notice of appeal shall be filed with the committee chair and with the Dean within five days of the action from which appeal is taken. Within five days of the filing of the notice of appeal, the committee chair shall forward to the Dean the entire record of the proceedings on the charge. The Dean may affirm the hearing panel's action, reverse it, or reverse it and return the charge for further proceedings by the hearing panel. In a case where the Dean affirms a hearing panel action sustaining a charge, or where the appeal is limited to the recommended sanction, the Dean may reduce but may not increase the sanction recommended by the hearing panel.

H. Reports to the Law School Community.

The committee shall prepare an annual written report of its activity. The report will contain a brief statement of the committee's action on each written complaint submitted to the chair. The statement will set forth the nature of the complaint, its referral for informal or formal resolution, and its final disposition. The statement will not contain names of parties or details regarding factual allegations.

HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

Working Group on Student-Sponsored Speakers

Outline of Guidelines

A. Commitment and Responsibilities of the Law School

The Harvard Law School is committed to maintaining an environment where open, vigorous debate and speech can occur. This commitment entails encouraging and assisting student organizations that want to sponsor speakers as well as informing students who seek guidance concerning forms of protest against speakers. It may also involve paying for extraordinary security measures in connection with a controversial speaker. Consistent with these obligations, the Law School promulgates these guidelines which are intended to be content-neutral.

B. Application of Guidelines

These guidelines apply to all student-sponsored meetings held at the Law School to which speakers are invited.

C. Meetings to be Designated as Open or Closed

1. A meeting to which a speaker is invited may be designated "open" or "closed". In either case, incidental Law School facilities such as room and utilities may be used.

2. Press may be invited whether the meeting is open or closed.

3. If a student organization or group uses Law School funds for other than incidentals, the meeting must be designated and treated as open. Use of room and utilities is considered "incidental" and therefore available for a closed meeting; all expenses of substance (*e.g.*, a speaker's travel expenses or provision of more than de minimis refreshments) are not considered "incidental," and may only be paid from Law School funds if the meeting is open.

   This requirement does not apply to meetings for which Law School funds have been authorized to finance a training event carried on by an organization designated by the Dean as a Law School training organization (*e.g.*, a Law School clinical organization or a Law School journal).

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4. Closed Meetings

   a) A closed meeting may be limited to membership in the organization, or by invitation to designated persons or groups, but cannot be closed on the basis of any category which is, or is a pretext for, discrimination in violation of the Law School's published antidiscrimination policies.

   b) To the extent that a closed meeting is advertised to those who are not invited to attend, there must be clear disclosure that the meeting is closed.

5. Open Meetings

   a) A meeting is considered open even though the sponsoring organization limits the audience to members of the Law School community or to members of the University community,or to portions thereof (*e.g.*, first-year students) unrelated to the sponsoring organisation.

   b) At an open meeting, at least two-thirds of the seats must be available to the Law School or University community or portion thereof, or to the public, as the case may be.

   c) Adequate and timely notice, ordinarily including Adviser notice or similar advertising, must be given for an open meeting.

D. Identification

   1. Attendees may be required to produce identification, so long as

      a) Advance notice is given as to what specific types of ID will be required.

      b) Identification procedures are enforced consistently and uniformly.

   2. When required in an open meeting, identification and, when appropriate, press credentials should be checked by an official perceived to be neutral (*e.g.*, an administrator, a designated general student monitor), not by a member of the sponsoring organization or by any person perceived as partisan.

E. Dissent/Protest

1. General Principles

The right to dissent is the complement of the right to speak, but these rights need not occupy the same forum at the same time. The speaker is entitled to communicate her or his message to the audience during her or his alloted time, and the audience is entitled to hear the message and see the speaker during that time. The dissenter must not substantially interfere with the speaker's ability to communicate or the audience's ability to hear and see the speaker.

When a meeting is closed, dissent by non-attendees is limited to activity outside the meeting that does not impede access to the meeting or substantially interfere with the communication inside. When a meeting is open, the acceptable form of dissent will depend on whether the dissenter is inside or outside the meeting, and on whether the dissenter is acting before or after the meeting or during the meeting.

2. Some Examples of Dissent

The following guidelines, which are neither comprehensive nor absolute, suggest the limits of acceptable dissent:

a) Picketing; literature. Picketing in an orderly way or distributing literature outside the meeting is acceptable unless it impedes access to the meeting. Distributing literature inside an open meeting is acceptable before the meeting is called to order and after the meeting is adjourned.

b) Silent or symbolic protest. Displaying a sign, wearing clothing, gesturing, standing, or otherwise protesting noiselessly is acceptable unless the protest interferes with the audience's view, or prevents the audience from paying attention to the speaker. Any use of signs, prolonged standing or other activity likely to block the view of any one in the audience should be confined to the back of the room.

c) Noise. Responding vocally to the speaker, spontaneously and temporarily, is generally acceptable, especially if reaction against the speaker is similar in kind and degree to reaction in his or her favor. Chanting or making other sustained or repeated noise in a manner which substantially interferes with the speaker's communication is not permitted, whether inside or outside the meeting.

d) Force or violence. Using or threatening force or violence, such as defacing a sign or assaulting a speaker or a member of the audience is never permitted. Any interference with freedom of movement, or with freedom from personal force and violence, is a serious violation of personal rights.

3. The Audience's Responsibility

The audience, like the host and the speaker, must respect the right to dissent. A member of the audience or the host organization who substantially interferes with acceptable dissent is violating these guidelines in the same way as a dissenter who violates the rights of the speaker or audience.

4. Question and Answer Period in Open Meetings

In any open meeting the sponsoring organization shall arrange with the speaker to assure a reasonable opportunity for a question and answer period.

F. Security

1. Senior Law School officials shall determine, either on their own initiative or after hearing from student organizations or groups, whether the protection of free speech at an open meeting requires measures to provide security.

2. Upon making this determination that security measures are required, these Law School officials, acting in consultation with the University Police, will have and will exercise the responsibility to determine the nature and extent of security measures required. The Law School or University will fund these measures. They may include but are not limited to, the following:

   a) Bags and other containers may be subject to search by university police, and may be required to be put in a checkroom before entrance to the event.

b) Coats or outerwear may be required to be put in a checkroom before entrance.

c) Videotaping of the event may be done, with notice to the audience.

3. When a meeting is closed, the sponsoring organization will ordinarily be responsible for planning, obtaining and funding its own security. Any provision for the use of force as a security measure will be planned with participation of the University police. Only the police may use force as a security measure.

G. Use of a Moderator/Facilitator

1. Determination of Need

Senior Law School officials may determine that the protection of free speech at an open meeting requires the use of a Moderator/Facilitator. If so, the meeting shall be held with a Moderator/Facilitator.

2. Selection

The Moderator/Facilitator will be selected by the sponsoring organization, subject to approval by the Law School administration. The person selected shall be perceived to be neutral and non-partisan. She/he will generally be a member of the Law School or university faculty or administration.

3. Role

The Moderator/Facilitator should make clear at the meeting that her/his role reflects no position for or against the views of the speaker or sponsoring organization.

At the event, final decisions regarding balancing the rights of the speaker with the rights of those who disagree will be made by the Moderator/Facilitator. These decisions include, but are not limited to:

a) Whether to eject a disrupter from the room.

b) Whether to suspend a speech temporarily if disruption occurs.

c) Whether to move an event because of disruption or security.

d) Whether to cancel an event because of security concerns.

H. Sanctions

Violation of the free speech rights of any person, as protected in these guidelines, will be treated seriously. Violators will be subject to the following sanctions:

a) Expulsion from the meeting or event.

b) Arrest or other legal action.

c) As to law students, disciplinary proceedings before the Law School Administrative Board, which may impose any of the following sanctions:

(1) Warning
(2) Written reprimand
(3) Suspension
(4) Expulsion

Pursuant to existing procedures, these Board sanctions may be noted on the student's transcript and later reported to appropriate bar officials.

d) As to other members of the University community, reference to appropriate faculties or university authorities.

I. Advisory Committee on Free Speech

The Dean should appoint an advisory committee on free speech including at least one representative each of the faculty, administration and students. The functions of this committee should include:

a) Advice to the Law School administration concerning the further development and the enforcement of these guidelines through content-neutral policies related to time, place, and manner.

b) Review of the effectiveness of these guidelines and proposals for change.

c) Recruitment and training, if needed, of moderator/facilitators.

THE UNIVERSITY OF NORTH CAROLINA AT CHARLOTTE

RACIAL HARASSMENT

I. Statement of Policy

The University of North Carolina at Charlotte affirms its commitment to ensuring an environment for all employees and students which is fair, humane, and respectful--an environment which supports and rewards employee and student performance on the basis of relevant considerations such as ability and effort. Behaviors which inappropriately assert a person's race, ethnicity or ancestry as relevant to employee or student performance are damaging to the desired environment. Racial harassment by any member of the University community is a violation of both law and University policy and will not be tolerated in the University community.

Having proclaimed the unacceptability of racial harassment, the University herein describes the machinery for the enforcement of the policy. In setting forth these rules for enforcement, the University must recognize the tension among three elements: freedoms of speech and assembly, the right of individuals to be free from injury caused by racial harassment, and the University's duty to protect the educational process. This policy is intended to protect freedoms of speech and assembly guaranteed by the First Amendment to the United States Constitution while at the same time deterring discriminatory conduct in the form of racial harassment which goes beyond the legally defined boundaries of free speech.

II. Definition of Racial Harassment

For purposes of this policy statement, racial harassment is defined as

> Any verbal or physical behavior that occurs on the University campus or on premises under University control, and stigmatizes or victimizes an individual on the basis of race, ethnicity, or ancestry, and that:
>
> A. Involves an express or implied threat to the individual's academic efforts, University-related employment, participation in University sponsored extracurricular activities, quiet enjoyment of campus residential living facilities, or personal safety; or
>
> B. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extracurricular activities, quiet enjoyment of campus residential living facilities, or personal safety; or

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C. Creates an intimidating, hostile or demeaning environment for educational pursuits, for University employment, for participation in University sponsored extracurricular activities, or for quiet enjoyment of campus residential living facilities.

III. Procedures

Because of the sensitive nature of situations involving racial harassment, and to assure speedy and confidential resolution of such issues, the University has established informal mediation procedures and formal grievance procedures for handling complaints of racial harassment. Informal procedures may be utilized, but are not required to precede the formal procedures.

If a complaint is directed against an individual who would otherwise play a role in responding to and attempting to resolve the complaint, the function assigned to that person by these procedures will be assigned to another person designated by the appropriate vice chancellor or the Chancellor of The University of North Carolina at Charlotte.

A. Informal Procedures

University Mediators

The function of University Mediators shall be to attempt to resolve informally complaints of racial harassment or other forms of discriminatory personal conduct brought forth by members of the University community. The selection of mediators shall be based on demonstrated sensitivity and/or knowledge of racial discrimination issues. Any student, staff member, or faculty member may select a mediator of his or her choice from the list of designated University Mediators that is published by the Affirmative Action Officer. A listing of University Mediators is posted on Department/Office Bulletin Boards throughout the University. Information regarding mediators is also available form the Personnel Office or the Office of the Dean of Students. Informal action may also be initiated by any administrative official of the University. Each mediator will function individually to mediate complaints, but all mediators will follow consistent procedures. Training of mediators shall be the responsibility of the University Affirmative Action Officer.

Mediators shall:

1. Listen to the complaint, and assist the complainant in clarifying his/her experiences and feelings.

2. Advise complainant on his/her options, both informal and formal.

3. Inform the University Affirmative Action Officer before any inquiry is begun.

4. At the request of the complainant -

   --Talk to the accused harasser without revealing the identity of the complainant, or

   --Meet together with complainant and the accused harasser,

   in an effort to workout a mutually satisfactory solution. Convey to the complainant the results of the discussion if the complainant does not meet with the accused harasser.

5. If both parties are satisfied with the outcome of the mediation process, the matter ends there.

6. If the accused harasser is not willing to participate in the mediation process, the mediator will inform the complainant of the formal procedures, and will explain the options available to the complainant.

7. If the complainant is not satisfied with the outcome, he/she may take the matter through the appropriate formal grievance procedures.

B. Formal Procedures

Formal procedures may be initiated by the aggrieved person or by an administrative official of the University subsequent to the failure of informal mediation. A formal grievance relating to a complaint of racial harassment may be initiated by any employee or student either in lieu of informal mediation or where efforts at informal mediation have failed.

1. Employees

   A University employee who wishes to proceed with a formal grievance shall use the standard grievance procedures appropriate to the employee's status as faculty, EPA non-faculty, or SPA employee.

   a. SPA Employees

      If the informal procedures described in Section III.A. have been attempted but resolution satisfactory to the employee has not been reached, the employee may submit a signed written statement to an ad hoc Grievance and Appeal Committee through the Director of Personnel (Step 3 of the "UNCC Grievance and Appeal Procedures for SPA Employees").

      If the informal procedures described in Section III.A. have not been attempted, the employee must attempt to resolve the grievance, beginning with Step 1 and may proceed to Step 2 if necessary, but may delete Step 1 and Step 2 if the immediate supervisor or department head is a person accused of racial harassment.

b. EPA Non-Faculty Employees

An EPA non-faculty employee may file a grievance with the EPA Non-Faculty Grievance Committee as described in Section IV.D. of the "Personnel Policies for Designated Employment Exempt from the State Personnel Act" (UNCC Policy Statement #64). That policy shall be interpreted so as not to require a prior effort to resolve the matter with the administrative official most directly concerned if that official is a person accused of racial harassment.

c. Faculty Employees

A faculty employee may file a grievance with the University Grievance Committee as described in Section IX.B.6. of the Tenure Policies, Regulations and Procedures of The University of North Carolina at Charlotte, except that when a faculty member alleges racial harassment as evidence of a charge that a decision not to reappoint him or her to the faculty was based upon one or more of the existing impermissible grounds, that complaint shall be to the University Hearing Committee in accord with Section V.D. of the Tenure Policies, Regulations and Procedures of The University of North Carolina at Charlotte.

2. Students

A student who wishes to proceed with a formal grievance shall use the procedures outlined in the Student Grievance Procedures or in the Code of Student Responsibility, as appropriate.

IV. Sanctions

Remedial actions will depend upon the facts and circumstances of the particular case. Every effort shall be made to resolve problems on an informal basis, if possible. When a mediator can resolve a complaint informally, no formal record of the incident will be considered to be part of the personnel file or student disciplinary record of the person accused. A confidential record of mediation efforts will be kept on file in the University Affirmative Action Office. If the complaint goes to formal grievance procedures and those procedures result in a finding that the racial harassment policy has been violated, the committee or panel reaching that conclusion may recommend to the administration appropriate relief for the person harassed and where appropriate, sanctions against the person who has violated the policy. Sanctions may be imposed only in accord with disciplinary procedures applicable to the violator's employment or student status.

V. Retaliation Prohibited

This policy seeks to encourage students, staff and faculty to express freely, responsibly, and in an orderly way their opinions and feelings about any problem or complaint of racial harassment. Any act by a University employee or agent of reprisal, interference, restraint, penalty, discrimination, coercion, or harassment--overtly or covertly--against a student or an employee for responsibly using this policy interferes with free expression and openness. Accordingly, such acts violate this policy and require appropriate and prompt disciplinary action.

VI. Frivolous or False Charges

This policy shall not be used to bring frivolous or malicious charges against fellow students, faculty members, or other employees. Disciplinary action under the appropriate personnel policies concerning personal misconduct or under the student disciplinary code shall be taken against any person bringing a charge or racial harassment in bad faith.

EMORY UNIVERSITY

POLICY STATEMENT ON DISCRIMINATORY HARASSMENT

It is the policy of Emory University that all employees and students should be able to enjoy and work in an educational environment free from discriminatory harassment. Harassment of any person or group of persons on the basis of race, color, national origin, religion, sex, sexual orientation, age, handicap, or veteran's status is a form of discrimination specifically prohibited in the Emory University community. Any employee, student, student organization, or person privileged to work or study in the Emory University community who violates this policy will be subject to disciplinary action up to and including permanent exclusion from the University.

Discriminatory harassment includes conduct (oral, written, graphic or physical) directed against any person or group of persons because of their race, color, national origin, religion, sex, sexual orientation, age, handicap, or veteran's status and that has the purpose or reasonably foreseeable effect of creating an offensive, demeaning, intimidating, or hostile environment for that person or group of persons. Such conduct includes, but is not limited to, objectionable epithets, demeaning depictions or treatment, and threatened or actual abuse or harm.

In addition, sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- submission to such conduct is made either explicity or implicitly a term or condition of an individual's employment or a student's status in a course, program or activity;
- submission to or rejection of such conduct by an employee or student is used as the basis for employment or academic decisions affecting that employee or student; or
- such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or a student's academic performance or creating an intimidating, hostile, or offensive employment, educational, or living environment.

All University Vice Presidents, Deans, and Division and Department Chairpersons should take appropriate steps to disseminate this policy statement and to inform employees and students of procedures for lodging complaints. All members of

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the student body, faculty, and staff are expected to assist in implementing this policy.

Nothing in this policy statement is intended to limit the scholarly content of written or oral presentations.

Any student or employee with a complaint of discriminatory harassment should contact the Assistant Vice President for Equal Opportunity Programs to obtain information on the procedure for handling such complaints. Any questions regarding either this policy statement or a specific fact situation should be addressed to the Emory University Office of Equal Opportunity Programs.

Adopted: August 31, 1988.

James T. Laney
President

III. SELECTED ARTICLES, COMMENTARY AND OUTLINES

PUBLIC RESPONSE TO RACIST SPEECH: CONSIDERING THE VICTIM'S STORY†

*Mari J. Matsuda**

I. INTRODUCTION

A black family enters a coffee shop in a small Texas town. A white man places a card on their table. The card reads, "You have just been paid a visit by the Ku Klux Klan." The family stands and leaves.[1]

A law student goes to her dorm and finds an anonymous message posted on the door, a caricature image of her race, with a red line slashed through it.[2]

A Japanese-American professor arrives in an Australian city and finds a proliferation of posters stating "Asians Out or Racial War" displayed on telephone poles. She uses her best, educated inflection in speaking with clerks and cab drivers, and decides not to complain when she is overcharged.[3]

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* Associate Professor of Law, University of Hawaii, the William S. Richardson School of Law. B.A. 1975, Arizona State University; J.D. 1980, University of Hawaii; LL.M. 1983, Harvard University. — Ed. The author wishes to acknowledge Hofstra University, the State University of New York at Buffalo School of Law, the University of Southern California Law Center, and the University of California at Davis, School of Law — where tentative versions of this Article were presented — and to thank Alex Aleinikoff, Monroe Freedman, Charles Jones, Amy Kastely, Charles Lawrence, Barbara Lubow, Toni Massaro, Richard Pildes, Frederick Schauer, Nadine Strossen, and René Todd for thoughtful responses to and, in some cases, disagreement with, this Article in earlier drafts. Lila Gardner, Michael Reveal, and Whitney Rupprecht provided valuable research assistance. Finally, the author owes much to Richard Delgado, whose imaginative power in responding to the problem of racism is a source of constant inspiration. To all the members of the *Michigan Law Review* and to the authors in this symposium issue, thanks are due for your vision and collaborative support.

[1] Incidents such as this are described in P. SIMS, THE KLAN 167-72 (1978). The calling card is a typical Klan technique. *Id.* at 168-72; *see also* Vietnamese Fishermen's Assn. v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1004 (S.D. Tex. 1981) (A woman who allowed Vietnamese immigrants' fishing boats to use her docks received a card that read "You have been paid a 'friendly visit' do you want the next one to be a 'real one.' ").

[2] At the University of California, Hastings College of the Law, someone defaced a Black History Month display in just such a manner. *Racist Caricatures Anger Students,* Recorder (San Francisco), Feb. 11, 1989, at 1. Last October, two students at Stanford University drew a racist caricature on a poster on the door of a black residential hall, and were not disciplined by the school for their actions. *Id.*

[3] Author's personal experience, Perth, Western Australia, July 1987, recounted in *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation,* 37 BUFFALO L. REV. 337 (1989) (transcript of the James McCormick Mitchell Lecture, State University of New York at Buffalo School of Law, Nov. 4, 1988) [hereinafter *Language as Violence*]. I later learned that right-wing hate movements have been blamed for the firebombing of Chinese restaurants in Perth. *Asian Immigrants Among Target of Australian Violence; Inquiry Scheduled,* Pacific Citizen, Mar. 24, 1989, at 2, col. 4.

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These unheralded stories share company with the more notorious provocation of swastikas at Skokie and burning crosses on suburban lawns.[4] The threat of hate groups like the Ku Klux Klan and the neo-Nazi skinheads goes beyond their repeated acts of illegal violence.[5] Their presence and the active dissemination of racist propaganda means that citizens are denied personal security and liberty as they go about their daily lives. Professor Richard Delgado recognized the harm of racist speech in his breakthrough article, ***Words That Wound,***[6] in which he suggested a tort remedy for injury from racist words. This Article takes inspiration from Professor Delgado's position, and makes the further suggestion that formal criminal and administrative sanction — public as opposed to private prosecution — is also an appropriate response to racist speech.[7]

In making this suggestion, this Article moves between two stories. The first is the victim's story of the effects of racist hate messages. The second is the first amendment's story of free speech. The intent is to respect and value both stories. This bipolar discourse uses as method what many outsider intellectuals do in silence: it mediates between different ways of knowing in order to determine what is true and what is just.[8]

In calling for legal sanctions for racist speech, this Article rejects an absolutist first amendment position. It calls for movement of the societal response to racist speech from the private to the public realm.[9] The choice of public sanction, enforced by the state, is a significant one. The kinds of injuries and harms historically left to private individuals to absorb and resist through private means is no accident.[10]

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[4] Klanwatch listed 28 reported cross-burnings in 1988. KLANWATCH INTELLIGENCE REPORT, Feb. 1989, at 11.

[5] For reports of the escalating violence of hate groups, see *id.* *See also* CIVIL RIGHTS DIVISION, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, YOUNG AND VIOLENT: THE GROWING MENACE OF AMERICA'S NEO-NAZI SKINHEADS 1 (1988) [hereinafter YOUNG AND VIOLENT].

[6] Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,* 17 HARV. C.R.-C.L. L. REV. 133 (1982).

[7] Some state and local governments have taken steps in this direction. *See infra* note 138.

[8] For elaboration of this point, see Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method,* 11 WOMEN'S RTS. L. REP. 7 (1989).

[9] Lawrence Friedman has called the separation of public and private force "one of the great master trends in criminal justice." L. FRIEDMAN, A HISTORY OF AMERICAN LAW 288 (2d ed. 1985). A developing state typically moves to monopolize imposition of sanctions on offensive conduct. Friedman also notes that this movement occurs when "private justice is either too ineffective or, conversely too effective, giving rise to feuds and wholesale bloodshed." *Id.* at 293. For a tragic illustration of private remedy, see Higgins v. Gates Rubber Co., 578 F.2d 281 (10th Cir. 1978) (An African-American employee subjected to unrelenting and long-standing racist harassment at work warned white co-workers to stop harassing him. When a white employee continued taunting, knocking off the African-American employee's hat, the African-American employee assaulted the provocateur, and was discharged.).

[10] Analysis of the public-private split, suggesting its political implications, is found in femi-

The places where the law does not go to redress harm have tended to be the places where women, children, people of color, and poor people live.[11] This absence of law is itself another story with a message, perhaps unintended, about the relative value of different human lives. A legal response to racist speech is a statement that victims of racism are valued members of our polity.

The call for a formal, legal-structural response to racist speech goes against the long-standing and healthy American distrust of government power. It goes against an American tradition of tolerance that is precious in the sense of being both valuable and fragile.

Dean Lee Bollinger has concluded that a primary reason for the legal protection of hate speech is to reinforce our commitment to tolerance as a value.[12] If we can shore up our commitment to free speech in the hard and public cases, like *Skokie,*[13] perhaps we will internalize the need for tolerance and spare ourselves from regrettable error in times of stress. Given the real historical costs of state intolerance of minority views, the first amendment purpose identified by Dean Bollinger is not one lightly set aside.

Recognizing both the real harm of racist speech and the need to strengthen our dangerously fickle collective commitment to freedom of discourse, this writer intends to feel and to work within the first amendment tension armed with stories from human lives. This Article suggests in the following Part that outsider jurisprudence — jurisprudence derived from considering stories from the bottom — will help resolve the seemingly irresolvable conflicts of value and doctrine that characterize liberal thought. Part III tells the victim's story of

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nist and critical literature. *See, e.g.*, Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986); Olsen, *The Family and the Market*, 96 HARV. L. REV. 1497 (1983); *see also* Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989) (discussing the effect of privatization of remedy on racial harm).

[11] DeShaney v. Winnebago County Dept. of Social Servs., 109 S.Ct. 998 (1989), denying state liability for third-party acts of child abuse, provides a recent tragic example. The historical response to racist harassment in this country has shifted with ambivalence between a public and private conception of appropriate penalties for racist speech. During the reconstruction period, several formal measures against race harassment were enacted. Subsequent enforcement was sporadic. *See* Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials 1871-1872*, 33 EMORY L.J. 921 (1984) (discussing early federal prosecutions for race harassment). Professor Charles Jones argues for a recommitment to the thirteenth and fourteenth amendment promise of freedom through active federal prosecution for hate crimes. Jones, *An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment*, 21 HARV. C.R.-C.L. L. REV. 689 (1986).

[12] L. BOLLINGER, THE TOLERANT SOCIETY: FREE SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

[13] Collin v Smith, 447 F. Supp. 676 (N.D. Ill.), *affd.*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); Village of Skokie v. National Socialist Party, 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977), *modified*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

the effects of racist hate speech. Part IV introduces the emerging international standard outlawing hate speech, and Part V presents the contrasting story of American first amendment jurisprudence. Part VI suggests a doctrinal accommodation of these contrasting world views, recognizing the values of liberty and equality at the heart of both the American and the international position. This part suggests a narrow restriction of racist speech, mindful of first amendment values. Part VII applies this standard to hard cases, making tentative suggestions of appropriate outcomes. Part VIII calls for doctrinal change, and concludes that an absolutist first amendment response to hate speech has the effect of perpetuating racism: Tolerance of hate speech is not tolerance borne by the community at large. Rather, it is a psychic tax imposed on those least able to pay.

II. OUTSIDER JURISPRUDENCE

> If we cannot understand this pain that women, that Indian women, that Black women, that Hawaiian women, that Chicano women go through, we are never going to understand anything. All the mega-theory will not get us anywhere because without that of understanding, mega-theory does not mean anything, does not reflect social reality, does not reflect people's experience.
>
> — *Patricia Monture*[14]

There is an outsider's jurisprudence[15] growing and thriving alongside mainstream jurisprudence in American law schools. The new feminist jurisprudence is a lively example of this.[16] A related, and less-celebrated, outsider jurisprudence is that belonging to people of color.[17]

What is it that characterizes the new jurisprudence of people of color? First is a methodology grounded in the particulars of their social reality and experience. This method is consciously both historical and revisionist, attempting to know history from the bottom. From the fear and namelessness of the slave,[18] from the broken treaties of the indigenous Americans,[19] the desire to know history from the bottom has forced these scholars to sources often ignored: journals, poems, oral histories, and stories from their own experiences of life in a hierarchically arranged world.[20]

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[14] Monture, *Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah*, CLS, July 1988, at 25, 32 (Newsletter of the Conference on Critical Legal Studies).

[15] This article uses "outsider" in order to avoid "minority" — a term that belies the numerical significance of the constituencies typically excluded from jurisprudential discourse. As with any attempt to classify a school of thought, this one oversimplifies and slights the nuances and diversity of a wide-ranging field.

[16] *See, e.g.*, Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043 (1987); Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373 (1986).

[17] Examples of jurisprudential writing explicitly considering the perspective of people of color include: D. BELL, AND WE ARE NOT SAVED (1987); Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331 (1988); Delgado, *supra* note 6; Hall, *The Constitution and Race: A Critical Perspective*, 5 N.Y.L. SCH. J. HUM. RTS. 229 (1988); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Scales-Trent, *Black Women and the Constitution*, 24 HARV. C.R.-C.L. L. REV. 9 (1989); Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (Patricia J. Williams) [hereinafter *Alchemical Notes*]; Williams, *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989) (Robert A. Williams, Jr.).

This methodology, which rejects presentist, androcentric, Eurocentric, and false-universalist descriptions of social phenomena, offers a unique description of law.[21] The description is realist, but not necessarily nihilist.[22] It accepts the standard teaching of street wisdom: law is essentially political.[23] It accepts as well the pragmatic use of law as a tool of social change, and the aspirational core of law as the human dream of peaceable existence.[24] If these views seem contradictory, that is consistent with another component of jurisprudence of color: it is jurisprudence recognizing, struggling within, and utilizing contradiction, dualism, and ambiguity.[25]

Dean Derrick Bell's book *And We Are Not Saved*[26] is an example of this. In a lyrical style Dean Bell describes a world infused with racism. This description ties law to racism, showing that law is both a product and a promoter of racism. Like the feminists who have shown that patriarchy has had its own march through history, related to but distinct from the march of class struggle, scholars of color have shown how racism is a separate, distinct, and central phenomenon in American life.

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[18] *See* Lawrence, *A Dream: On Discovering the Significance of Fear*, 10 NOVA L. REV. 627 (1986).

[19] *See* V. DELORIA, CUSTER DIED FOR YOUR SINS 28-53 (1969).

[20] *See* Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 344-45 (1987) (discussing alternative sources).

[21] *See, e.g.*, Donovan & Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435 (1981) (arguing for replacing the "reasonable man" standard used in analyzing criminal self-defense cases with a standard that recognizes the social reality of women and people of color).

[22] See Jones, *Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and the First Amendment*, 23 HOW. L.J. 429, 447-56 (1980), for an analysis of the first amendment that attempts to create a doctrinal space for the antiracist outcomes the author advocates.

[23] The intuitive realism of outsiders is discussed in Matsuda, *supra* note 20, at 323.

[24] *See, e.g.*, Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 301 (1987) (arguing that while some aspects of the CLS approach to legal analysis are useful, its "advocacy of informality . . . ignores the need for structure in containing and eliminating racism"); Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQUALITY 103 (1987) (arguing that for people of color, critical legal theory must be used to *transform* current injustices).

[25] The theme of dualism is discussed, *inter alia*, in W.E.B. DUBOIS, THE SOULS OF BLACK FOLK (1961), and Stetson, *Introduction* to BLACK SISTER: POETRY BY BLACK WOMEN, 1746-1980, at xviii (E. Stetson ed. 1981). *See also* Hall, *Race and Constitution: Epilogue*, N.Y.L. SCH. J. HUM. RTS. 425, 426 (1988) (A character in Hall's parable, a Mississippi grandma, says "I know firsthand the duality of law."). The duality of the Constitution has been analyzed by Justice Thurgood Marshall. Marshall, *The Constitution: A Living Document*, 30 HOW. L.J. 623 (1987).

[26] D. BELL, *supra* note 17.

The hopeful part of the description offered by theorists such as Bell is the occasional recognition of the vulnerability of racist structures. The few who have managed to subject the many to conditions of degradation have used a variety of devices, from genocide to liberal doublespeak, that reveal the deep contradictions and instability inherent in any organization of social life dependent upon subordination. The sorrow songs[27] of the jurisprudence of color are thus tempered by an underlying descriptive message of the inevitability of humane social progress.[28]

This progress can lead to a just world free of existing conditions of domination. The prescriptive message of outsider jurisprudence offers signposts to guide our way there: the focus on effects.[29] The need to attack the effects of racism and patriarchy in order to attack the deep, hidden, tangled roots characterizes outsider thinking about law. Outsiders thus search for what Anne Scales has called the rachet[30] — legal tools that have progressive effect, defying the habit of neutral principles to entrench existing power.[31] They have derived rachet-like measures to eliminate effects of oppression, including affirmative action, reparations, desegregation, and the criminalization of racist and misogynist propaganda. Such measures are best implemented through formal rules, formal procedures and formal concepts of rights, for informality and oppression are frequent fellow-travelers.[32] While cognizant of the limits of law reform, outsider scholars have emphasized the instrumental uses of formal legal rules to achieve substantive justice.

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[27] W.E.B. DuBois used African-American "sorrow songs" — an art form reflecting the "dark past" — as headnotes to his classic text, *The Souls of Black Folk*. *See* W.E.B. DUBOIS, *supra* note 25, at 181.

[28] One sees in the work of Frederick Douglass, for example, this messianic belief that the best will someday come. *See* W. MARTIN, THE MIND OF FREDERICK DOUGLASS 54 (1984).

[29] *See, e.g.*, Williams, *supra* note 10, at 2128-30 (affirmative action and proof of discrimination; the effect and proof issue).

[30] Section on Jurisprudence, Am. Assn. of L. Schs. Newsl., Dec. 1987, at 5.

[31] *See, e.g.*, Littleton, *Feminist Jurisprudence: The Difference Method Makes* (Book Review), 41 STAN. L. REV. 751, 770 (1989) ("[T]he legal system's insistence on symmetry, even between two asymmetrically positioned social groups, keeps the door open to additional incursions of male viewpoint . . . .").

[32] *See Alchemical Notes*, *supra* note 17, at 406-08; Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; *cf.* G. ALLPORT, THE NATURE OF PREJUDICE 461-78 (1954) (discussing the effect of formal laws on personal attitudes). The use of stories, the theme of this symposium, is not necessarily a denouncement of structure in law. As I see it, stories are a means of obtaining the knowledge we need to create just legal structure.

Using the descriptive and prescriptive messages of the emerging outsider jurisprudence to confront the problem of racist hate messages provides new insights into the longstanding neutral-principle[33] dilemma of liberal jurisprudence. The following section will show how the victim's story illuminates particular values and suggests particular solutions to the problem of racist hate messages.

III. RACIST HATE MESSAGES: THE VICTIM'S STORY

> The attempt to split bias from violence has been this society's most enduring rationalization.
>
> — *Patricia Williams*[34]

A. *Who Sees What: Some Initial Stories*

In writing this Article I am forced to ask why the world looks so different to me from how it looks to many of the civil libertarians whom I consider my allies. Classical thought labels *ad hominem* analysis a logical fallacy.[35] The identity of the person doing the analysis often seems to make the difference, however, in responding to racist speech. In advocating legal restriction of hate speech, I have found my most sympathetic audience in people who identify with target groups, while I have encountered incredulity, skepticism, and even hostility from others.[36]

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[33] The power of symmetry and neutrality claims is not lost on the Klan. In its efforts to exploit free speech claims it marches over the same routes as civil rights demonstrators. *See, e.g.*, Handley v. City of Montgomery, 401 So. 2d 171 (Ala. Crim. App. 1981) (Klan attempt to march without a permit from Selma to Montgomery).

For exploration of the concepts of bias and neutrality, see Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. Cal. L. Rev. 1945 (1988), and Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. Cal. L. Rev. 1877 (1988).

[34] Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 Miami L. Rev. 127, 139 (1987).

[35] *See* D. Walton, Arguer's Position: A Pragmatic Study of Ad Hominem Attack, Criticism, Refutation, and Fallacy 41-42 (1985).

[36] Law review articles suggesting limitation of hate speech are typically written by members of groups that have been victims of hate speech. *See, e.g.*, Au, *Freedom from Fear*, 15 Lincoln L. Rev. 45 (1984) (arguing for a revival of *Beauharnais* in light of increases in anti-Asian violence and propaganda); Delgado, *supra* note 6; Jones, *supra* note 22 (advocating legal response to racist speech, and recounting his own harassment — including the words, "No Blacks Allowed Here" — while a student in Wisconsin); Kretzmer, *Free Speech and Racism*, 8 Cardozo L. Rev. 445 (1987). Feminist writers have also attempted to recognize the world view of victims of racism. *See, e.g.*, Donovan & Wildman, *supra* note 21.

In the several audiences I have addressed on this issue, women, Jews, and people of color have offered the most vocal statements of support. A notable counter example is the Jewish civil libertarians who have eloquently, and at great personal cost, argued for the free speech rights of Nazis and Klan members. This view, which sees the right of protest as essential for the protection of minorities, leads these civil libertarians to defend their enemy. *See* A. Neier, Defend-

This split in reaction is also evident in case studies of hate speech. The typical reaction of target-group members to an incident of racist propaganda is alarm and immediate calls for redress.[37] The typical reaction of non-target-group members is to consider the incidents isolated pranks, the product of sick-but-harmless minds.[38] This is in part a defensive reaction: a refusal to believe that real people, people just like us, are racists.[39] This disassociation leads logically to the claim that there is no institutional or state responsibility to respond to the incident. It is not the kind of real and pervasive threat that requires the state's power to quell.[40]

Here are some true "just kidding" stories:

> *An African-American worker found himself repeatedly subjected to racist speech when he came to work. A noose was hanging one day in his work area. "KKK" references were directed at him, as well as other unfortunately typical racist slurs and death threats. His employer discouraged him from calling the police, attributing the incidents to "horseplay."*[41]

ING MY ENEMY (1979). While I disagree with this view, I admire the courage and conviction it reflects.

[37] Immediate redress is required because hate messages are rarely isolated. They usually arise in a setting where racial tensions exist, they tend to spread and replicate, and the presence of one hate message tends to give rise to others. On the university campuses, for example, it is rare to hear of one incident only. Most of the reports cited in this Article, *see infra* note 71, noted numerous occurrences on the same campus. In the *Skokie* case, anonymous anti-Semitic phone calls plagued Jewish-surnamed residents of Skokie during the controversy over the Nazi demonstrators. *See* Collin v. Smith, 447 F. Supp. 676, 681 (N.D. Ill.), *affd.*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

[38] THEY DON'T ALL WEAR SHEETS: A CHRONOLOGY OF RACIST AND FAR RIGHT VIOLENCE — 1980-1986, at 18 (C. Lutz comp. 1987) [hereinafter THEY DON'T ALL WEAR SHEETS] (compiling thousands of racist incidents and finding that "in the overwhelming majority of instances, bigoted violence is simply ignored, dismissed as the work of young 'pranksters' or simply left unexplained"). *But see* CONNECTICUT ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, HATE GROUPS AND ACTS OF BIGOTRY: CONNECTICUT'S RESPONSE 60 (Oct. 1981) [hereinafter HATE GROUPS] (eleven percent of state residents dismiss incidents as pranks). In response to NAACP and ADL testimony of firebombings and harassment in Connecticut, one local police sergeant stated: "I believe these incidents are isolated and they are not necessarily racially motivated. I think perhaps the notoriety of other communities and the publicity the news media is giving these incidents is causing some of our younger people to act in that manner." *Id.* at 7.

[39] *See* Lawrence, *supra* note 17, at 321 (subconscious racism of ordinary people); *cf.* R. LIFTON, THE NAZI DOCTORS (1986) (accounts of how seemingly ordinary professionals came to participate in Nazi atrocities).

[40] *Cf.* Homant, *Assessing Psychological Damages of Crime Victims*, 25 TRIAL 86, 89 (1989) ("Because most people find it comforting to believe in a 'just world,' the idea that life is fair and people get what they deserve, jurors may have a natural tendency to believe victim precipitation occurred.")

[41] *See* Citchen v. Firestone Steel Prods. Co., Nos. 12,190-EM & 15,389-EM (Mich. Civ. Rts. Commn. May 23, 1984), *reported in* 1984 MICHIGAN CIV. RTS. COMMISSION, CASE DIGEST 13, 17-18. The *Citchen* case is treated extensively in Denis, *Race Harassment Discrimination: A Problem That Won't Go Away?*, 10 EMPLOYEE REL. L.J. 415 (1984). The employee was subjected to repeated hate messages including "Get out, n——r, you ain't wanted here," "N——r Ben, KKK," "KKK for you, Ben." *Id.* at 415. Taunts included notes in his shoe, welding his

In San Francisco, a swastika was placed near the desks of Asian-American and African-American inspectors in the newly integrated fire department. The official explanation for the presence of the swastika at the fire department was that it was presented several years earlier as a "joke" gift to the battalion chief, and that it was unclear why or how it ended up at the work stations of the minority employees.[42]

In Jackson, Mississippi, African-American employees of Frito-Lay found their cars sprayed with "KKK" inscriptions, and were the targets of racist notes and threats. Local African Americans and Jews were concerned, but officials said the problem was attributable to children.[43]

An African-American FBI agent was subject to a campaign of racist taunts by white co-workers. A picture of an ape was pasted over his child's photograph, and racial slurs were used. Such incidents were called "healthy" by his supervisor.[44]

In Seattle, a middle-management Japanese American was disturbed by his employer's new anti-Japanese campaign. As the employer's use of slurs and racist slogans in the workplace increased, so did the employee's discomfort. His objections were viewed as overly sensitive and uncooperative. He finally quit his job, and he was denied unemployment insurance benefits because his departure was "without cause."[45]

In Contra Costa, California, Ku Klux Klan symbols were used to turn families looking for homes away from certain neighborhoods. The local sheriff said there was "nothing . . . to indicate this is Klan activity."[46]

Similarly, a Hmong family in Eureka, California, was twice victim-

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locker lock, a dead mouse, fishbones, and a kerosene-soaked cross in his locker. Repeated threats over a nine-year period resulted in a diagnosis of hypertension and depression. *Id.* at 434-35. The Civil Rights Commission eventually awarded the employee $1.5 million in damages. *Id.* at 416.

[42] *S.F. Fire Department Declared "Out of Control"*, Asian L. Caucus Rep., July-Dec. 1987, at 1, col 1. Edwin Lee of Chinese for Affirmative Action called the swastika incident "an act of racial violence, not to be taken lightly, but to be severely disciplined." *Id.*

[43] Poverty Law Report, Mar.-Apr. 1982, at 11, col. 2.

[44] *Black F.B.I. Agent's Ordeal: Meanness That Never Let Up*, N.Y. Times, Jan. 25, 1988, at 1, col. 1.

[45] Complaint at 3, EEOC v. Hyster Co., Civ. No. 88-930-DA (D. Ore. filed Aug. 15, 1988) (alleging a hostile work environment created by racially objectionable advertisement campaign and use of racial slurs by management in work place). An Answer denying those allegations was filed by the defendant. *See also* Mr. M.K.O. v. Hyster Co., Charge No. 380,863,519, at 1-3 (Wash. EEOC Dec. 15, 1987) (determination) (The EEOC found workplace references to "J—p competition," "the J—ps are coming," "slant-eye engines," "get those J—p engines out of there," "you can't trust those J—p bastards," and noted that the local and national Japanese-American community found use of racial references in the company's ad — using samurai, kabuki, sumo figures associated with competitors — offensive. The employer's Director of Human Resources testified that the word "J—p" is not derogatory. He also stated that "W—p" — an epithet directed at Italians — is not derogatory.).

Racist harassment of employees of Japanese ancestry is not uncommon. *See* Japanese American Library Bulletin, Winter 1989, at 4, col. 2 (noting EEOC action on behalf of Harumi Yoshimoto, targeted for "Remember Pearl Harbor" comments at a construction project).

[46] *Racial Violence Belies Good Life in Contra Costa County*, L.A. Times, Dec. 7, 1980, at 3, col. 5.

> *ized by four-foot-high crosses burning on their lawn. Local police dismissed this as "a prank."*[47]

Why might anti-Japanese racial slurs mean something different to Asian and white managers?[48] Here is a story of mine:

> *As a young child I was told never to let anyone call me a J—p.*[49] *My parents, normally peaceable and indulgent folk, told me this in the tone reserved for dead-serious warnings. Don't accept rides from strangers. Don't play with matches. Don't let anyone call you that name. In their tone they transmitted a message of danger, that the word was a dangerous one, tied to violence.*
>
> *Just as I grew up to learn the facts about the unspoken danger my parents saw in the stranger in the car, I learned how they connected the violence of California lynch mobs and Hiroshima atom bombs to racist slurs against Japanese Americans.*
>
> *This early training in vigilance was reinforced by what I later learned about violence*[50] *and Asian Americans: that people with features like mine are regular victims of violence tied to a wave of anti-Asian propaganda that stretches from Boston*[51] *to San Francisco,*[52] *from Galveston*[53] *to Detroit.*[54]

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[47] Asian and Pacific Islander Advisory Comm., Office of Attorney Gen., Cal. Dept. of Justice, Final Report 45 (1988) [hereinafter Attorney General's Report].

[48] Being non-Asian is not necessarily an impediment to understanding the Asian experience. Donovan & Wildman, *supra* note 21, show this in the hypothetical used in their article on provocation (arguing for reduction in the degree of criminal charge for an Asian who commits a crime under provocation of racial slurs, considering life experience of Japanese-American defendant, including World War II internment, racial harassment at work, and knowledge of prejudice against Japanese Americans).

[49] This Article does not spell out racial slurs in a personal effort to avoid harm to others, and to prevent desensitization to harmful words. As Audre Lorde has written:

but I remember a promise
I made with my pen
never to leave it
lying
in somebody else's blood.

A. Lorde, *To the Poet Who Happens To Be Black and the Black Poet Who Happens To Be a Woman*, in Our Dead Behind Us 7 (1986).

[50] Anti-Asian violence and harassment have grown considerably in recent years. *See Caucus Continues Anti-Asian Violence Work*, Asian L. Caucus Rep., Aug. 1988, at 2, col. 4.

[51] *See* U.S. Commn. on Civil Rights, Recent Activities Against Citizens and Residents of Asian Descent (Clearinghouse Pub. No. 88, 1986) [hereinafter Recent Activities] (documenting hate speech and violence directed against Asians throughout the United States, including Boston).

[52] *See* Attorney General's Report, *supra* note 47 (documenting numerous incidents of anti-Asian violence in California).

[53] *See* Vietnamese Fishermen's Assn. v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1001 (S.D. Tex. 1981) (intimidation of Vietnamese fishing families by paramilitary shows of force, threats — that it "may become necessary to take laws into our own hands" and "blood blood blood" — boat rides of armed, hooded Klansmen, firing cannons, hanging effigies, threatening children and families of whites who dealt with Vietnamese, pointing weapons at Vietnamese, and threatening to burn boats at Galveston Bay, Texas).

[54] *See* Recent Activities, *supra* note 51, at 43-44 (concerning the murder of Vincent Chin).

The white managers who considered Mr. O. (the Japanese-American manager) an overly sensitive troublemaker, and the unemployment board that determined there was no good cause for him to quit his job, came from a different experience. They probably never heard of Vincent Chin.[55] They do not know about the Southeast-Asian-American children spat upon and taunted as they walk home from school in Boston; about the vigilante patrols harassing Vietnamese shrimpers in Texas.[56] Nor do they know that the violence in all these cases is preceded by propaganda similar to that used in Mr. O's workplace: that those [racist slur for Asian groups] are taking over "our" country.

Stories of anti-Asian violence are regularly reported in the Asian-American press;[57] just as stories of synagogue vandalism are regularly reported in the Jewish-American press;[58] and anti-African-American violence, including the all-too-common phenomenon of "move-in" violence,[59] is regularly reported in the African-American press.[60] Members of target-group communities tend to know that racial violence and harassment is widespread, common, and life-threatening; that "the youngsters who paint a swastika today may throw a bomb tomorrow."[61]

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[55] Vincent Chin was a 27-year-old Chinese American beaten to death by baseball-bat-wielding thugs in Detroit. The assailants yelled, "It's because of you fucking J—ps that we're out of work!" The Vincent Chin case is a symbol to Asian Americans of the threat of racist violence. *See* Civil Rights Capacity-Building Project, Asian American Resource Workshop, To Live in Peace . . . Responding to Anti-Asian Violence in Boston 8 (1987).

[56] *See id.* at 9-16 (citing several murders, beatings, fire bombings and harassment of Asians in the greater Boston area, including spitting and pebble-throwing directed against Cambodian school children); *Vietnamese Fishermen*, 518 F. Supp. at 1001.

[57] *See, e.g.*, Chin, *Violence Against Asians*, Rice, Feb. 1988, at 72; *Compilation of Racial Attacks on [Asian] Indians*, APAC Alert, Nov. 1988, at 1, col. 1 (newsletter of the Asian Pacific American Coalition, U.S.A); *Dangerous Upsurge in Immigrant Scapegoating*, CAAV Voice, Fall 1988, at 3, col. 2 (newsletter of the Committeee Against Anti-Asian Violence); *Caucus Continues Anti-Asian Violence Work*, Asian L. Caucus Rep., Aug. 1988, at 2, col. 2. Anti-Asian violence is regularly reported in the *Pacific Citizen*, a weekly newspaper published by the Japanese American Citizens League.

[58] *See, e.g.*, *The Jewish Journal of Greater Los Angeles*, for articles on hate crime, including Noonan, *Locking Out Crime*, Jewish J. of Greater L.A., Feb. 24-Mar. 2, 1989, at 5, col. 1; Pfefferman, *Hate Crimes' Victims*, *id.* at 5 (There are reports of vandalism every three weeks at Temple Beth Torah in Ventura — including graffiti, a dead pig carcass, break-ins, rocks thrown, shotgun blasts, and broken windows and doors. The President of the congregation reported "I'm not dealing with it well. I just feel so violated."); Carroll, *Former Klansman's Election*, *id.* at 6; Levin, *Trouble on the Campus*, *id.* at 7. *See also* Simon Wiesenthal Center, Response, Aug. 1988, at 6 (reporting synagogue arson).

[59] *See, e.g.*, Mich. Advisory Comm. to the U.S. Commn. on Civil Rights, Hate Groups in Michigan: A Sham or a Shame 5-6 (1982) (reporting a black woman's loss of four fingers in a pipe-bomb explosion in her home in a predominantly white neighborhood in Detroit; "KKK," "White Power" and racial epithets spray-painted on a church after a black congregation moved into the facility located in a predominantly white neighborhood in Detroit); *For the Record*, Klanwatch Intelligence Report, May-June 1987, at 8, col. 1 (reporting numerous incidents of move-in harassment and violence); *Now Is the Time: Outlaw the KKK, Nazis, and Other Hate Groups*, The Organizer, June/July 1986, at 2, col. 1, at 7, col. 2 (newsletter of the National Alliance Against Racist & Political Repression ("NAARPR")) (The house of a black couple was firebombed the night they moved into a white neighborhood in suburban Louisville, Kentucky. Several members of the police force at the time of the incident were members of the KKK. The KKK had also invaded a meeting of the NAARPR in Louisville.).

The mainstream press often ignores these stories, giving rise to the view of racist and anti-Semitic incidents as random and isolated, and the corollary that isolated incidents are inconsequential.[62] For informed members of these victim communities, however, it is logical to link together several thousand real life stories[63] into one tale of caution.[64]

B. *The Structure of Racism*

While this Article focuses on the phenomenology of racism, it includes discussion of the closely related phenomenon of anti-Semitism. The same groups, using many of the same techniques, and operating from many of the same motivations and dysfunctions typically produce racist and anti-Semitic speech. The serious problems of violent pornography and anti-gay and anti-lesbian hate speech are not discussed in this Article.[65] While I believe these forms of hate speech

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[60] *See, e.g., The NAACP 1988 Convention Resolutions,* The Crisis, Dec. 1988, at 27, 28 (reporting NAACP convention resolution on racially motivated violence, citing incidents in Ohio, Indiana, Georgia, New York, Alabama, New Jersey, and at the University of Michigan and the University of Massachusetts at Amherst).

[61] Ga. State Advisory Comm. to the U.S. Commn. on Civil Rights, Perceptions of Hate Group Activity In Georgia 3 (1982) [hereinafter Hate Group Activity] (testimony of Stuart Lowengrub, Southeastern Regional Director, Anti-Defamation League of B'nai B'rith, Atlanta).

At the University of Maryland, two-thirds of the white students had not heard of racist incidents, while four-fifths of African-American students had. Wilkerson, *Campus Blacks Feel Racism's Nuances,* N.Y. Times, Apr. 17, 1988, at 1, col. 3, at 34, col. 4.

[62] For two constrasting views of how courts perceive these "isolated incidents," compare Blanco v. Hallmark Cards, 681 F. Supp. 692 (D. Kan. 1987) (occasional epithets do not create a hostile work environment), with Kunz v. New York, 340 U.S. 290, 295 (1951) (Jackson, J., dissenting) (recognizing the abusive nature of epithets).

[63] *See* They Don't All Wear Sheets, *supra* note 38 (3000 acts of bigoted violence reported from 1980-1986). One study found that one out of four or five minority persons is victimized by hate activity in the course of a year. *Bigots' Crimes Called More Violent Than Perceived,* Chicago Tribune, Mar. 28, 1989, at 3, col. 2 [hereinafter *Bigots' Crimes*] (reporting findings of the National Institute Against Prejudice and Violence).

[64] The Klan has admitted in court documents that its goal is to interfere with the exercise of civil rights, and that it accomplishes this by assaults, threats, and harassment against African Americans and against whites who support civil rights. This admitted purpose and method is what makes the word "KKK" and Klan symbolism so threatening to targets. *See* United States v. Original Knights of Ku Klux Klan, 250 F. Supp. 330, 337 (E.D. La. 1965) (reporting Klan admissions and explaining that they were made in order to prevent the taking of evidence from over 100 government witnesses on the goals and intimidation tactics of the Klan).

[65] *See* American Booksellers Assn. v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984), *affd.,* 771 F.2d 323 (7th Cir. 1985), *affd. mem.,* 475 U.S. 1001 (1986) (declaring unconstitutional an attempt to ban pornography that subjugates women); Brest & Vandenberg, *Politics, Feminism,*

require public restriction, these forms also require a separate analysis because of the complex and violent nature of gender subordination, and the different way in which sex operates as a locus of oppression.[66] They are, therefore, beyond the scope of this piece.

The claim that a legal response to racist speech is required stems from a recognition of the structural reality of racism in America. Racism, as used here, comprises the ideology of racial supremacy and the mechanisms for keeping selected victim groups in subordinated positions.[67] The implements of racism include:[68]

1. Violence and genocide;
2. Racial hate messages, disparagement, and threats;
3. Overt disparate treatment; and
4. Covert disparate treatment and sanitized racist comments.

In addition to physical violence, there is the violence of the word.[69] Racist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group. The spoken message of hatred and inferiority is conveyed on the street, in schoolyards, in popular culture and in the propaganda of hate widely distributed in this country.[70] Our college campuses have seen an epidemic of racist incidents

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and the Constitution: The Anti-Pornography Movement in Minneapolis, 39 STAN. L. REV. 607 (1987).

[66] Violence and hate speech directed against women, gays, and lesbians, for example, are commonplace, socially accepted, and widely distributed across lines of race, class, and geography. Pornography affects women through different mechanisms than does hate speech. Pornography is the direct portrayal of sexual use and abuse of women, tied to the practice of actual violence. The visceral, "noncognitive," and violent nature of pornography is central to calls for its restraint. *See, e.g.*, Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985) (discussing, *inter alia*, pornographic portrayal of women being killed and mutilated, and the direct connection between pornography and violence); Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589.

[67] For a review of definitions of racism, see W. SEDLACEK & G. BROOKS, RACISM IN AMERICAN EDUCATION: A MODEL FOR CHANGE 38 (1976). Racism includes conscious as well as unconscious acts of subordination; thus no claim of intentionality is made in this Article. *See* Lawrence, *supra* note 17.

[68] H. KITANO, RACE RELATIONS 121-29 (1974) (discussing stages of ethnic identity); H. SCHUMAN, C. STEEH & L. BOBO, RACIAL ATTITUDES IN AMERICA 193-212 (1985) (changing methods of expressing racist views).

[69] *Cf.* Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (noting that the process of interpretation of legal language is ultimately bound to the imposition of violence).

[70] The rise in hate crimes by minors is sad testimony to the spread of the racist message. Uzelac, *Punk Rocking, Neo-Nazi 'Skinheads' Giving Boost to Hate Groups*, Atlanta J. & Const., Jan. 2, 1989, [illegible] 2, col. 6 (Seventy children gathered at a Mississippi training camp in December 1988 for white supremacist political education and military drills. For target practice they reportedly shot at images of Dr. Martin Luther King, Jr.). In Davis, California, Thong Hy Huynh, a Vietnamese-American high school student was stabbed to death after months of racial taunts. A memorial marking his death was spray-painted with swastikas and "Death to G—ks." ATTORNEY GENERAL'S REPORT, *supra* note 47, at 44.

The influence of hate propaganda on psychopathic killers also reveals the widespread availability of the culture of hate. *See* ATTORNEY GENERAL'S REPORT, *supra* note 47, at 44 (pregnant Chinese immigrant pushed in front of oncoming subway train by man who feared Asians); *A Law* in the 1980s.[71] The hate speech flaring up in our midst includes insulting nouns for racial groups, degrading caricatures, threats of violence, and literature portraying Jews and people of color as animal-like and requiring extermination.[72]

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for Racist Killers, NEWSWEEK, Feb. 23, 1981, at 80 (schizophrenic killer thought African Americans were "like animals, to be eaten."); *Social Worker Relates Stockton Tragedy to JACL National Board*, Pacific Citizen, Feb. 10, 1989, at 1, col. 1 (mass murder of Southeast Asian-American school children by deranged killer with possible racial motivation).

[71] *See* THEY DON'T ALL WEAR SHEETS, *supra* note 38, at 12 (noting increase of racist incidents on college campuses); Lord, *Greek Rites of Exclusion*, 245 NATION, 10 (1987) at 10 (At the University of Michigan: racist leaflets in dorms, verbal abuse of African-American students, white students painting themselves black and placing rings in their noses at "jungle parties"); White, *The New Racists*, Ms., Oct. 1987 at 68 (reporting racist incidents at the University of Michigan, the University of Massachusetts at Amherst, the University of Wisconsin, the University of New Mexico, Columbia, Wellesley, Duke, and UCLA); Wilkerson, *supra* note 61 (reporting fliers urging lynchings, epithets, stone-throwing, swastikas, and anti-Asian graffiti, at several American universities); Cohen, *White Supremacists Find Recruits on Campus*, Klanwatch Intelligence Report, Feb. 1988, at 15, col. 1 (flyers stating "The Knights of the Ku Klux Klan are watching you" distributed at Northwest Missouri State University; KKK members speaking at Kansas University; White Student Union formed at Temple University; White Student Union flyers at University of Wisconsin, Milwaukee; Aryan Resistance literature at Stanford; Invisible Empire literature at Stockton State College, New Jersey; bomb threats at Memphis State University Jewish Student Union; bullet fired at Hillel Foundation Building at Arizona State University); *Roses and Thorns*, Perspectives (American Historical Association Newsletter), Sept. 1987, at 23 (statement of historians attending the Fifth Citadel Conference on the South, expressing "concern over continued racial incidents upon the nation's campuses" and noting intimidation of African-American students at Harvard, Rutgers, Purdue, Columbia, the Citadel, and the Universities of Massachusetts at Amherst, Michigan, and Wisconsin); *see also* Wiener, *Reagan's Children, Racial Hatred on Campus*, 248 NATION, 260 (1989) (Racist statements and incidents at the University of Michigan, Dartmouth, Wisconsin, UCLA, Purdue, Montclair State College, New Jersey were reported. At Michigan, a campus radio announcer referred to African hair as "pubic" hair. At Dartmouth, a professor was called "a cross between a welfare queen and a bathroom attendant," and the Dartmouth Review purported to quote a black student, "Dese boys be sayin' that we be comin' here to Dartmut an' not takin' the classics. You know, Homa . . . ." At Wisconsin, a fraternity held a mock "slave auction" and other fraternities held black-face "Harlem parties," and used anti-Semitic remarks. At Purdue, a counselor found "Death N——r" scratched on her door); *Racist Caricatures Anger Students*, *supra* note 2; *Cal Poly Pomona Students Protest Anti-Asian Attacks*, Pacific Citizen, Mar. 17, 1989, at 1, col. 4 (students protest racist incidents including attack on a Japanese-American woman); Harvard Law Record, Jan. 20, 1989, at 8, col. 1 (burning and ripping of Jesse Jackson poster, swastika in elevator, defacing of women of color poster, placing a laundry ticket on Asian students poster, reported at NYU Law School); Harris, *Hindman's "Nega" Example Reveals Problem*, Cavalier Daily (University of Virgina), Nov. 10, 1988, at 2, col. 2 (A student's comments on the events surrounding, and following, an incident involving Phi Gamma Delta fraternity party fliers using words "No . . . short w—ps and please no nega babes." Fraternity members reported these were inside jokes intended to insult women and were not of a racial nature. Several weeks later, the student found a sign repeating the slur. The sign had been posted by a vice chairman of the Honor Committee.); Klanwatch Intelligence Report, Feb. 1988, at 13, col. 1 ("KKK" carved on dormitory room door of two African-American women students at Chapel Hill, North Carolina); *id.* at 18, col. 2 (Social Nationalist Aryan People's Party literature distributed at Mills College; anti-Semitic flyers at Stanford prior to the 50th anniversary of Kristallnacht); *Professor Fasts to Right Violence Against Asians*, Pacific Citizen, Sept. 9, 1988, at 1, col. 1 (Asian-American students at the University of Connecticut at Storrs were harassed and spat upon. A Chinese-American professor began a hunger strike in protest.).

[72] For a case involving victims of such speech, *see, e.g.*, Cummings v. Adkins, No. 79-2-02278-0 (Yakima, Wash., County Super. Ct. Aug 10, 1981), *described in* 25 ATLA L. Rep. 66 (1982) (employee subject to racial slurs at work). For a horror story of racial harassment in the workplace, see Taylor v. Jones, 653 F.2d 1193, 1198-99 (8th Cir. 1981) (African-American Ar-

While violence and hate propaganda are officially renounced by elites,[73] other forms of racism are not.[74] Jim Crow, which persists today in the form of private clubs and de facto segregated schools and neighborhoods, is seen as less offensive than cross burnings. Covert disparate treatment and sanitized racist comments are commonplace and socially acceptable in many settings.[75] The various implements of racism find their way into the hands of different dominant-group members. Lower- and middle-class white men might use violence against people of color, while upper-class whites might resort to private clubs or righteous indignation against "diversity" and "reverse discrimination."[76] Institutions — government bodies, schools, corporations — also perpetuate racism through a variety of overt and covert means.[77]

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kansas National Guard employees subjected to racist language and jokes, physical threats, being called "boy," a noose hanging in a supply room, the office mail cart used to spread hate messages including "the only good n——r is a dead n——r," and other obscene defamation so extreme it is not included in this footnote). *See also* Chicago v. Lambert, 47 Ill. App. 2d 151, 197 N.E. 2d 448 (1964) (prosecution for hate speech degrading Jews and African Americans — hate literature reprinted with opinion).

[73] This official line masks the commonality of elite participation in racist violence. *See* H. SHAPIRO, WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY (1988). Shapiro notes the history of white elite participation in and support for violence against African Americans, and notes that, given the historical prevalence of violence generated by white racism, "it is one of the ironies of contemporary experience that many Americans have been conditioned to associate violence with the behavior of black people." *Id.* at xi.

[74] Adrienne Rich recalls the social conduct of upper-class southern whites that expressed racism in polite language, such as the expression, "That's white of you." A. RICH, BLOOD, BREAD, AND POETRY 103, 106 n.2 (1986).

[75] I have heard many anti-African-American, anti-Latino, and anti-Semitic comments by people who assume that Asian Americans are not offended by such speech. I have heard these comments in law firms, at universities, and at fancy dinner parties, as well as in working-class settings. In my efforts of private reprimand for racist speech, I have found upper-class speakers more likely to defend their racism. When I objected to the statement that members of an ethnic group are welfare cheaters, the wealthy woman who made the statement proceeded to provide "evidence" that she was correct. When I objected to an L.A. cabdriver's similar statement, he responded, "Lady, I grew up among garbage and garbage comes out of my mouth," and he apologized for offending me.

[76] *See* H. SCHUMAN, C. STEEH & L. BOBO, *supra* note 68, at 202-05 (showing longitudinal changes in American public opinion favoring equality but resisting remedial steps to implement equality); Kinder, *The Continuing American Dilemma: White Resistance to Racial Change 40 Years After Mydral*, 42 J. SOC. ISSUES 151 (1986) (Symbolic racism blends values of individualism and self-reliance with racism. This modern form is evidenced in opposition to busing, affirmative action, and African-American candidates for office, and agreement with statements that African Americans are demanding too much.); Sears, Hensler & Speer, *Whites' Opposition to "Busing": Self-Interest or Symbolic Politics?*, 73 AM. POL. SCI. REV. 369 (1979) (discussing "symbolic racism" and the ways in which deep seated fears are converted into opposition to busing or affirmative action); *see also* Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 687-92 (1985) (identifying features of modern prejudice, including: (1) rejection of gross stereotypes, (2) compliance without internalization of racial acceptance, (3) emotional ambivalence, (4) micro-aggressions — use of nonracial objections to racial change, (5) sense of subjective threat, (6) individualistic conceptions of opportunity).

[77] *See* W. SEDLACEK & G. BROOKS, *supra* note 68, at 5-7 (discussing "How Racism Operates"). Government officials are frequently caught using racist slurs. *See, e.g.*, T. BELL, THE

From the victim's perspective, all of these implements inflict wounds, wounds that are neither random nor isolated. Gutter racism, parlor racism, corporate racism, and government racism work in coordination, reinforcing existing conditions of domination. Less egregious forms of racism degenerate easily into more serious forms.

The Japanese-American executive who resigns in protest when his employer starts publishing anti-Japanese slogans to improve sales knows that there is a connection between racist words and racist deeds. The racially motivated beating death of Vincent Chin by unemployed white auto workers in Detroit, during a time of widespread anti-Asian propaganda in the auto industry, was no accident.[78] Nor was the murder of the Davis, California, high school student Thong Hy Huynh, after months of anti-Asian racial slurs.[79]

Violence is a necessary and inevitable part of the structure of racism.[80] It is the final solution, as fascists know, barely held at bay while the tactical weapons of segregation, disparagement, and hate propaganda do their work. The historical connection of all the tools of racism is a record against which to consider a legal response to racist speech.

C. *The Specific Negative Effects of Racist Hate Messages*

everywhere the crosses are burning,
sharp-shooting goose-steppers around every corner,
there are snipers in the schools . . .
(I know you don't believe this.
You think this is nothing
but faddish exaggeration. But they
are not shooting at you.)

Lorna Dee Cervantes[81]

THIRTEENTH MAN: A REAGAN CABINET MEMOIR 104 (1987) (Dr. Martin Luther King, Jr. referred to as a "c—n"; Arabs referred to as "sand n——rs" by members of the Reagan White House staff).

[78] *See* THEY DON'T ALL WEAR SHEETS, *supra* note 38, at 17 ("There are no areas of the country where white supremacist organizations have been extremely active without correspondingly high levels of bigoted violence."). Anti-Asian racist slurs used by auto-industry and trade executives are documented in *Asia Bashing: Bias Against Orientals Increases with Rivalry of Nations' Economics*, Wall St. J., Nov. 28, 1986, at 1, col. 1. For a history of attacks on Asian Americans during times of perceived threat from "foreigners," see ATTORNEY GENERAL'S REPORT, *supra* note 47, at 33-39.

[79] ATTORNEY GENERAL'S REPORT, *supra* note 47, at 44.

[80] A dramatic increase in racist violence and murder occurred in the late 1980s, particularly associated with the skinheads. *See Reports of Racial Violence on the Rise*, Klanwatch Intelligence Report, Feb. 1989, at 9, col. 1; *see also* LOS ANGELES COUNTY COMMN. ON HUMAN RELATIONS, HATE CRIME IN LOS ANGELES COUNTY 1988, at 1 (1989) [hereinafter HATE CRIME IN L.A.] (reporting escalation of hate crimes beginning in 1986 and 1987, continuing through 1988, after a period of decline in the mid-1980s).

[81] Cervantes, *Poem for the Young White Man Who Asked Me How I, An Intelligent Well-*

Racist hate messages are rapidly increasing and are widely distributed in this country using a variety of low and high technologies.[82] The negative effects of hate messages are real and immediate for the victims.[83] Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide.[84] Professor Pa-

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Read Person Could Believe in the War Between Races, in M. SANCHEZ, CONTEMPORARY CHICANA POETRY 90 (1986).

[82] For a history of hate group activity, see SOUTHERN POVERTY LAW CENTER, THE KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE (3d ed. 1988) (noting history and recent rise of KKK, and growing coalition of violent right-wing hate groups in the United States, including neo-Nazis, survivalists, skinheads, and the KKK). Hate messages are spread through anonymous phone calls and letters, posters, books, magazines and pamphlets, cable television, recorded phone messages, computer networks, bulk mail, graffiti, and leafletting. *See* CIVIL RIGHTS DIVISION, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, SPECIAL EDITION: ELECTRONIC HATE (1987) (report on use of cable television public access by hate groups); CIVIL RIGHTS DIVISION, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, "SHAVED FOR BATTLE": SKINHEADS TARGET AMERICA'S YOUTH (1987) (use of music and youth culture to spread white supremacist ideology and violence); Chin, *supra* note 57, at 72 (White Aryan Resistance telephone message blaming high insurance rates on Asians and Latinos); Dent, *Et Al.*, STUDENT LAW., Dec. 1984, at 46 (recorded message using the word "n——r" 9 times in 75 seconds); Jones, *Violence by Skinheads Spreads Across Nation*, L.A. Times, Dec. 19, 1988, at 1, col. 3 (reporting 2000-3500 members of violent racist groups using bulk mail, computers, television, and leafleting of schools — particularly in the northwest — to attract growing numbers of new members).

More recent cases show little change in racists' style. *See, e.g.*, *License Issue Goes Away*, N.Y. Times, Sept. 6, 1986, at 10, col. 1 (reporting sale of KTTL-FM of Dodge City, Kansas, which had urged listeners to "mak[e] dossiers, names, addresses, phone numbers, car license numbers" on all rabbis, in order to "set up ambushes").

[83] *See, e.g.*, Wade v. Orange County Sheriff's Office, 844 F.2d 951, 953 (2d Cir. 1988) (African-American sheriff's deputy suffered emotional distress and humiliation from racial discrimination at work); Wilmington v. J.I. Case Co., 793 F.2d 909 (8th Cir. 1986) (African-American welder suffered several years of racial harassment and employment discrimination resulting in severe health complications). The harm of racist insult is discussed extensively in Delgado, *supra* note 6. Delgado cites classic psychological evidence of the destruction of self-worth by racist attitudes.

[84] Effects of racial prejudice include displaced aggression, avoidance, retreat, withdrawal, alcoholism, and suicide. H. KITANO, *supra* note 68, at 113; *see also* G. ALLPORT, *supra* note 32, at 141-61 (psychological responses to racist victimization include withdrawal, clowning, strengthening in-group ties, self-hate, militancy, status-striving, and the self-fulfilling prophecy); ATTORNEY GENERAL'S REPORT, *supra* note 47, at 45 (racial epithets and harassment "often cause deep emotional scarring, and bring feelings of intimidation and fear that pervade every aspect of a victim's life"); Delgado, *supra* note 6 (noting, *inter alia*, high blood pressure, loss of self-worth, and special harm to children); *cf.* Denis, *supra* note 41, at 415 (discussing damages for psychic injury in race harassment cases); Häfner, *Psychological Disturbances Following Prolonged Persecution*, SOC. PSYCHIATRY, July 1968, at 79 (discussing psychological symptoms including headaches, dizziness, social withdrawal, chronic depression, and anxiety neurosis in survivors of extreme persecution). The unprovoked and unpredictable nature of bigoted attacks adds to the anxiety they create. African Americans have been subjected to racist attacks while engaging in commonplace activities such as changing a tire or attending a church picnic. *See* HATE GROUPS, *supra* note 38, at 5. Victims have had some limited success in proving emotional distress and psychological damage from racist messages. *See, e.g.*, Vance v. Southern Bell Tel. & Tel. Co., 672 F. Supp. 1408 (M.D. Fla. 1987), *affd. in part, revd. in part*, 863 F.2d 1503 (11th Cir., 1989) (woman subjected to repeated racial harassment, including nooses hanging over her desk, suffered nervous breakdown).

tricia Williams has called the blow of racist messages "spirit murder" in recognition of the psychic destruction victims experience.[85]

Victims are restricted in their personal freedom. In order to avoid receiving hate messages, victims have had to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor.[86] The recipient of hate messages struggles with inner turmoil. One subconscious response is to reject one's own identity as a victim-group member.[87] As writers portraying the African-American experience have noted, the price of disassociating from one's own race is often sanity itself.[88]

As much as one may try to resist a piece of hate propaganda, the effect on one's self-esteem and sense of personal security is devastating.[89] To be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance. When hundreds of police officers are called out to protect racist marchers,[90] when the courts refuse redress for racial insult, and when racist attacks are officially dismissed as pranks, the victim becomes a stateless person. Target-group members can either identify with a community that promotes racist speech, or they can admit that the community does not include them.

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[85] Williams, *supra* note 34, at 129.

[86] *See, e.g.*, EEOC v. St. Anne's Hosp., 664 F.2d 128 (7th Cir. 1981) (African-American employee fired after hospital receives racist bomb threats for hiring African Americans); Sambos Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686, 703 (6th Cir. 1981) (Keith, J., dissenting) (African Americans tend to avoid public facilities with racially offensive names); HATE GROUP ACTIVITY, *supra* note 61, at 20 (discussing case of a fourteen-year-old boy who was the subject of Klan leafleting campaign and became so frightened he dropped out of school); *id.* at 23 (citing testimony of State Representative and civil rights leader, Hosea Williams, to the effect that he has become leery of civil rights marches because after outsiders leave, local whites harass local African Americans).

See also Letter from Bobby Person (July 3, 1986) (distributed by the Southern Poverty Law Center) (prison guard, the first African American to attain the rank of sergeant, was harassed with a cross burning and KKK visits); Denis, *supra* note 41 (citing several cases of race harassment in the workplace); Dent, *supra* note 82, at 48 (African-American Naval Reserve ensign resigns from officers' school after threats from "Navy KKK"). At the other end of the spectrum, racial stereotyping carries daily modification of behavior and dress to counteract stereotypes. *See* Lieberson, *Stereotypes: Their Consequences for Race and Ethnic Interaction*, in RESEARCH ON RACE AND ETHNIC RELATIONS 113 (C. Marrett & C. Leggon eds. 1985).

Professor Judith Weightman has told me that, in conducting interviews with Japanese-American World War II veterans, she noted denial of discrimination that, upon questioning, turned to an admission that informants simply avoided places, organizations, and events that perpetuated anti-Japanese exclusion and thus could report "not experiencing" discrimination. *See also* H. KITANO, *supra* note 68, at 113-14 (discussing ways in which ethnics avoid situations where they will encounter prejudice).

[87] When this writer confronted a cityful of anti-Asian posters, a strange process of disassociation occurred. "Not me, they must mean those immigrants." One researcher of racially motivated crime noted that "victims will deny it's a hate crime. If you feel you're a victim because of your religion or your color, then each time you step out the door [you fear] you're going to be attacked." Professor Jack McDevitt, Center for Applied Social Research at Northeastern University, *quoted in Bigots' Crimes*, *supra* note 63. *See also* H. KITANO, *supra* note 68, at 113-14 (discussing the "passing" syndrome).

[88] *See* Baldwin, *African Self-Consciousness and the Mental Health of African-Americans*, 15 J. BLACK STUDIES 177 (1984) ("Alien self" in African Americans comes from identifying with Europeans); *cf.* Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 67-68 (discussing tendency of outsider groups to "internalize the views" of the dominant group); Cervantes, *supra* note 81 ("Let me show you my wounds: my stumbling mind, my 'excuse me' tongue, and this nagging preoccupation with the feeling of not being good enough."). *See generally* W. GRIER & P. COBBS, BLACK RAGE (1968).

The effect on non-target-group members is also of constitutional dimension. Associational and other liberty interests of whites are curtailed by an atmosphere rife with racial hatred.[91] In addition, the process of dissociation can affect their mental health. Dominant-group members who rightfully, and often angrily, object to hate propaganda share a guilty secret: their relief that they are not themselves the target of the racist attack. While they reject the Ku Klux Klan, they may feel ambivalent relief that they are not African-American, Asian, or

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[89] As one student reported after watching harassment of an African-American professor at Dartmouth, "That moment let me know that there are people in this world who hate you just because of your color. Not dislike you, or choose not to be friends with you, but hate you." Wiener, *supra* note 71, at 260. Any practicing psychotherapist knows of adults forever scarred by an early message of "you're not good enough," which creates lifelong feelings of inadequacy and inability to experience inner joy at one's achievements and abilities. I thank my student Terry Wade, a psychotherapist, for this insight.

[90] *See 6 Protesters Arrested at Houston Klan March*, N.Y. Times, Apr. 3, 1983, at 23, col. 1 (six hundred police in riot gear protected Ku Klux Klan marchers in Houston).

[91] Hate messages, threats, and violence against whites is often the price of hiring, marrying, adopting, socializing with, and even jogging with, people of color. *See* EEOC v. St. Anne's Hospital, 664 F.2d 128 (7th Cir. 1981) (bomb threat for hiring an African American); Guillory v. Godfrey, 134 Cal. App. 2d 628, 286 P.2d 474 (1955) (white woman suffers nervous breakdown after hiring a black cook to work in her restaurant, as a result of constant racist harassment from neighbors); HATE GROUP ACTIVITY, *supra* note 61, at 19 (Gene Guerrero, Executive Director, ACLU of Georgia, testified of repeated harassment of a white woman recreation director who supervised integrated children. After cross burnings and KKK letters directed at her, she decided to flee to another state.); THEY DON'T ALL WEAR SHEETS, *supra* note 38, at 13; YOUNG AND VIOLENT, *supra* note 5, at 11 (reporting skinhead murder of white musician who brought an African American to a party in Santa Clara, California); Dent, *supra* note 82, at 48 (Estacada, Oregon home of interracial couple vandalized with KKK graffiti); *5 Youths Charged After Store Melee Under New Ethnic Intimidation Law*, Detroit Free Press, Apr. 26, 1989, at 4A, col. 3 (skinheads harass and attack white man walking with three African Americans); *see also* United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330, 339 (E.D. La. 1965) (Klan rules require boycott of whites who, *inter alia*, "serve[ ] Negroes and whites on an integrated basis" or "allow[ ] Negroes to use White rest rooms" and adding that a Klan member who patronizes boycotted whites "shall be *wrecked by the wrecking crew* who shall be appointed by the Committee."). Judge Wisdom's opinion chronicled instances of the Klan interfering with the exercise of civil rights and first amendment rights in Bogalusa, Louisiana, including notices that "we have KLAN members in every conceivable business . . . . [W]e take this means to urge all of you to refrain from attending this meeting. Those who do attend [are] integrationists and will be dealt with accordingly . . . ." 250 F. Supp. at 343.

Jewish. Thus they are drawn into unwilling complacency with the Klan, spared from being the feared and degraded thing.

Just as when we confront human tragedy — a natural disaster, a plane crash — we feel the blessing of the fortunate that distances us from the victims, the presence of racist hate propaganda distances right-thinking dominant-group members from the victims, making it harder to achieve a sense of common humanity. Similarly, racist propaganda forces victim-group members to view all dominant-group members with suspicion.[92] It forces well-meaning dominant-group members to use kid-glove care in dealing with outsiders.[93] This is one reason why social relations across racial lines are so rare in America.

Research in psychosocial[94] and psycholinguistic[95] analysis of racism suggests a related effect of racist hate propaganda: at some level, no matter how much both victims and well-meaning dominant-group members resist it, racial inferiority is planted in our minds as an idea that may hold some truth.[96] The idea is improbable and abhorrent, but it is there before us, because it is presented repeatedly. "Those people" are lazy, dirty, sexualized, money-grubbing, dishonest, inscrutable, we are told.[97] We reject the idea, but the next time we sit next to one of "those people" the dirt message, the sex message, is triggered.[98] We stifle it, reject it as wrong, but it is there, interfering with our perception and interaction with the person next to us.[99] For the victim, similarly, the angry rejection of the message of inferiority is coupled with absorption of the message. When a dominant-group member responds favorably, there is a moment of relief — the victims of hate messages do not always believe in their insides that they deserve decent treatment. This obsequious moment is degrading and dispiriting when the self-aware victim acknowledges it.[100]

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[92] As one student wrote in the midst of controversy over a racist poster at the University of Virginia, "How can I, the Average White Student, communicate to the 'black community' that I am not racist?" The student went on to argue that "bigotry" and "racism" are as insulting as racial epithets and to decry "hostility and suspicion." Whether the student's analysis is correct, it carried a tone of genuine frustration at the lack of collegial relations between African American and white students during the poster controversy. Letter to the Editor, University Journal (University of Virginia), Nov. 4, 1988, at 4, col. 2. As one sensitive student wrote to me, his WASP-ness subjects him to "double ostracism — from whites who cannot stand my [anti-racist] attitude and outsiders who look at my skin and distrust."

[93] *Cf.* Brislin, *Prejudice and Intergroup Communication*, in Intergroup Communication 74, 74 (W. Gudykunst ed. 1986) (white anxiety stemming from conscious desire to overcome history of prejudice in society "can be interpreted as coldness or lack of spontaneity"); Weitz, *Attitude, Voice, and Behavior: A Repressed Affect Model of Interracial Interaction*, 24 J. Personality & Soc. Psychology 14, 20 (1972) (whites treated African Americans with "verbal overfriendliness, coupled with vocal and behavioral cues of affective retreat").

[94] For discussion of the psychology of negative associations with blackness, see W. Jordan, White over Black: American Attitudes Toward the Negro, 1550-1812 (1968); J. Kovel, White Racism: A Psychohistory (1970); Frank & Gilovich, *The Dark Side of Self- and Social Perceptions: Black Uniforms and Aggression in Professional Sports*, 54 J. Personality & Soc. Psychology 74 (1988) (more penalties assessed to teams in black uniforms).

[95] The field of psycholinguistics studies the relationship between language and human behavior, exploring the ways in which the words we hear and speak can affect our behavior. *See* L. Fergenson, Group Defamation, From Language to Thought and Action (unpublished paper presented at the Hofstra University Conference on Group Defamation & Freedom of Speech, Apr. 21, 1988) citing, *inter alia*, H. Clark & E. Clark, Psychology and Language: An Introduction to Psycholinguistics (1977). *See also Media Violence and Antisocial Behavior*, J. Soc. Issues, No. 3, 1986, at 1 (L.R. Huesmann & N. Malamuth eds.).

[96] Psychological study of cueing behavior indicates that overhearing a racist slur causes the listener to evaluate members of the slurred group more harshly in the future. Greenberg & Pyszczynski, *The Effect of an Overheard Ethnic Slur on Evaluations of the Target: How to Spread a Social Disease*, 21 J. Experimental Soc. Psychology 61, 70 (1985).

Psychologists and sociologists have done much to document the effects of racist messages on both victims and dominant-group members.[101] Writers of color have given us graphic portrayals of what life is like for victims of racist propaganda.[102] From the victim's perspective[103] racist hate messages cause real damage.[104]

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[97] *See, e.g.*, Steplan & Rosenfield, *Racial and Ethnic Stereotypes*, in In the Eye of the Beholder: Contemporary Issues in Stereotyping 92 (A. Miller ed. 1982) (persistence of negative stereotyping of African Americans).

[98] *Cf.* Gardner & Taylor, *Ethnic Stereotypes: Their Effects on Person Perception*, 22 Canadian J. Psychology 267 (1968); Lobel, *Effects of Personal Versus Impersonal Rates Instructions on Relative Favorability of Thirteen Ethnic Group Stereotypes*, 128 J. Soc. Psychology 29 (1987) (citing various studies of prejudice and stereotyping).

[99] Another story: In conducting research for this Article, I read an unhealthy number of racist statements. A few weeks after reading about a "dotbusters" campaign against immigrants from India, I passed by an Indian woman on my campus. Instead of thinking, "What a beautiful sari," the first thought that came into my mind was "dotbusters." Only after setting aside the hate message could I move on to my own thoughts. The propaganda I read had taken me one step back from casually treating a fellow brown-skinned human being as that, rather than as someone distanced from myself. (Numerous incidents of racially motivated violence and hate speech against Asian Indians have occurred in recent years. *See* APAC Alert, *supra* note 57.)

[100] Professor Patricia Williams does us a service in addressing this phenomenon in her courageous writing for this symposium. *See* Williams, *supra* note 10.

[101] *See* G. Allport, *supra* note 32; H. Kitano, *supra* note 68, at 113-14 (discussing effects of prejudice); H. Schuman, C. Steeh & L. Bobo, *supra* note 68, at 123, 137 (negative responses to Ku Klux Klan declining in public opinion). In addition to harm to victims, racist speech in a way harms the speaker, by causing the speaker's isolation and escalating racism. *See* Abelson, *Beliefs Are Like Possessions*, 16 J. Theory Soc. Behav. 227, 228 (1986) (insults cause arguers to become more extreme in their positions). As we learn more about the compulsive/psychosocial aspects of racism, we may come to see how allowing the racist speaker to fall into an accelerating upward spiral of racist behavior is akin to letting a disease go untreated. The paternalistic ring of the disease model causes dis-ease given our knowledge of the harm done under that model to innocent nonconformists, the weak, the poor, women, and children. On the other hand, extreme libertarian individualism denies the racists the opportunity to know what life might be like if their escalating racism were to be restrained. This possibility is particularly poignant considering the young children socialized into racism in "junior klan" organizations. *See supra* note 71.

[102] *See, e.g.*, Afro-American Writing (R. Long & E. Collier eds. 1985).

[103] Alan Freeman recognized the value of victim perspective in his article, *Antidiscrimination Law: A Critical Review*, in The Politics of Law 96 (D. Kairys ed. 1982).

[104] David Matas, National Chair of the League of Human Rights of B'nai B'rith, Canada, noted in the Canadian context that the World War II internment of Japanese Canadians, and the

If the harm of racist hate messages is significant, and the truth value marginal, the doctrinal space for regulation of such speech is a possibility. An emerging international standard seizes this possibility.

IV. INTERNATIONAL LAW OF HUMAN RIGHTS — EMERGING ACCEPTANCE OF THE VICTIM'S STORY

The international community has chosen to outlaw racist hate propaganda. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination states:

> *Article 4*
>
> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia:*
>
> *(a)* Shall declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> *(b)* Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organization or activities as an offence punishable by law; [and]
>
> *(c)* Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.[105]

Under this treaty, states are required to criminalize racial hate messages. Prohibiting dissemination of ideas of racial superiority or hatred is not easily reconciled with American concepts of free speech. The Convention recognizes this conflict. Article 4 acknowledges the need for "due regard" for rights protected by the Universal Declaration of Human Rights and by article 5 of the Convention — including the rights of freedom of speech, association, and conscience.

Recognizing these conflicting values, and nonetheless concluding

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turning away of Jewish Holocaust refugees in Canada, was a concrete harm resulting from hate propaganda. D. Matas, *Should Zundel Have Been Prosecuted?*, Remarks Prepared for a Seminar in Halifax 3-4 (Mar. 22, 1985) (on file with author).

[105] International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter Racial Discrimination Convention].

that the right to freedom from racist hate propaganda deserves affirmative recognition, represents the evolving international view. An American lawyer, trained in a tradition of liberal thought, would read article 4 and conclude immediately that it is unworkable. Acts of violence, and perhaps imminent incitement to violence are properly prohibited, but the control of ideas is doomed to failure. This position was voiced continually in the debates[106] preceding adoption of the Convention, leading to the view that article 4 is both controversial and troublesome.[107]

To those who struggled through early international attempts[108] to deal with racist propaganda, the competing values had a sense of urgency.[109] The imagery of both book burnings and swastikas was clear in their minds.[110] Hitler had banned ideas. He had also murdered six million Jews in the culmination of a campaign that had as a major theme the idea of racial superiority. While the causes of fascism are complex,[111] the knowledge that anti-Semitic hate propaganda and the rise of Nazism were clearly connected guided development of the emerging international law on incitement to racial hatred.

In 1959 and 1960, the United Nations faced an "outburst of anti-Semitic incidents in several parts of the world."[112] The movement to implement the human rights goals of the United Nations Charter and of the Universal Declaration gained momentum as member states sought effective means of eliminating discrimination.[113]

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[106] *See* N. Lerner, The U.N. Convention on the Elimination of All Forms of Racial Discrimination 43-53 (2d ed. 1980).

[107] *See id.* at 53.

[108] The article is the result of many attempted rewordings and compromises, going back to the first attempts at formation of an international bill of rights. In 1949, the Commission on Human Rights, chaired by Eleanor Roosevelt, proposed a draft International Covenant on Human Rights. The draft was an early attempt to concretize the "lofty principles" of the Universal Declaration of Human Rights. The draft enumerated several specific rights, and imposed obligations of implementation upon member states. Between article 20, governing equal protection before the law, and article 22, avoiding construction of the covenant that would destroy rights protected therein, is a noticeable gap. There is no article 21. Instead, the Commission left a notation that it had postponed discussion of article 21, which, in a version proposed by France, refers to incitement to violence through "advocacy of national, racial, or religious hostility." *Text of Draft International Covenant on Human Rights As Submitted to Member Governments for Consideration and Comment*, 1949 Y.B. on Hum. Rts. 332, 336, U.N. Sales No. 1951.XIV.1. The problem of racist speech, it seems, was not one the Commission was ready to deal with in 1949.

[109] The Italian representative, for example, spoke of the millions of victims of racial hatred "in our generation." N. Lerner, *supra* note 106, at 10.

[110] In 1963, the General Assembly adopted the Declaration on the Elimination of All Forms of Racial Discrimination in response to "outbursts of swastica painting around the world in 1959-60." R. Lillich & F. Newman, International Human Rights 130 (1979).

[111] *See generally* F. Carsten, The Rise of Fascism (1967).

[112] N. Lerner, *supra* note 106, at 1.

[113] The movement for implementation first focused upon a General Assembly Declaration

While there was consensus on the basic goal of elimination of discrimination, there was division on the question of incitement to hatred. The Sub-Commission on the Prevention of Discrimination and Protection of Minorities began work in 1964, using drafts prepared by the representatives of the United States, by the United Kingdom, and a joint draft by the representatives of the USSR and Poland.[114] Thus the Sub-Commission had the benefit of vastly different ideological views as well as a basic consensus on the necessity of combating discrimination.

In addressing incitement, the American draft would have outlawed direct incitement to acts of racist violence.[115] It would have disallowed government involvement in chartering or supporting racist hate groups. This was consistent with American constitutional principles. The USSR/Poland draft would have banned all "propaganda" of "superiority" and would have criminalized participation in any organization that discriminated or advocated discrimination.[116] In obvious contrast to the American view, the socialist nations proposed direct action against hate messages, expressing little concern for an individualistic, civil libertarian conception of free speech.

Discussion by the Commission on Human Rights centered around the problems of proving when propaganda was likely to cause violence, and whether violence was the only end to avoid.[117] The problem of freedom of association and the banning of hate organizations was also discussed. The final decision, by a vote of 16 in favor and 5 abstentions, was to adopt paragraph 4(b) as it is now written, banning propaganda activity that promoted discrimination, and criminalizing participation in organizations promoting discrimination.[118] The weaker American position was thus rejected by the Commission.

The proposed convention next went to the Third Committee of the General Assembly in 1965. Again the issues of the necessity of ties to

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on the Elimination of All Forms of Racial Discrimination. G.A. Res. 1904, 18 U.N. GAOR Supp. (No. 15) at 35, U.N. Doc. A/5515 (1963).

[114] N. LERNER, *supra* note 106, at 4-5.

[115] Revised draft of article 4 submitted to the Sub-Commission by Mr. Abram, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/L.308/Add.1/Rev.1 (1964). This view is consistent with American case law. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

[116] Draft of article 4 submitted by Messrs. Ivanov and Ketrzynski, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/L.314 (1964).

[117] *See* N. LERNER, *supra* note 106, at 44-45 (discussions among, *inter alia*, representatives of Denmark, India, and Costa Rica on the role of incitement to violence).

[118] *Id.* at 45.

violence and of recognition of free speech rights were raised.[119] The United States proposed explicit recognition of the right of free speech within the text.[120] The Committee chose instead to refer generally to "due regard" of article 5 rights. Acts of violence were prohibited, but the final form of the proposed article went further. It also outlawed the mere dissemination of racist ideas, without requiring proof of incitement. An atmosphere of hatred, it was argued by the Polish representative, would inevitably lead to discrimination.[121]

When the draft finally reached the General Assembly, Argentina, Colombia, Ecuador, Panama, and Peru — countries relatively friendly to the United States — proposed deletion of the dissemination-of-ideas language. This amendment was rejected — 54 against, 25 in favor, and 23 abstaining[122] — but the limited consensus on this point indicates the controversial nature of the article. Notably, in other areas of international human rights consensus building, serious ideological controversy dooms a proposal to failure. Language banning anti-Semitism, for example, died a political death because of Arab and Soviet concerns that the charge of anti-Semitism would be used as a political weapon against them.[123] Article 4 is unique in that a clearly controversial proposition survived in the final Convention. The survival of article 4, in spite of the controversy, indicates the overriding strength of the basic idea that promotion of racism is a serious threat to the protection of human rights.

The General Assembly debates on article 4 focused on free speech. While the issue was never clearly resolved, it is significant that no country, not even the United States, was willing to abandon the basic premise of article 4. The article declares that states parties "condemn all propaganda . . . based on ideas or theories of superiority . . . or which attempt[s] to justify or promote racial hatred and discrimination in any form."[124] Similarly, the preamble to the Convention states explicitly that "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination."[125] The community of nations has thus made a commitment, with United States support, to the elimination of racism. It has recognized that racist hate propaganda is illegitimate and properly subject to control under the international law of human rights. The debate, then, centers around the limits of such control, not around the basic decision to control racism.

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[119] *Id.* at 45-46.

[120] *Id.* at 46.

[121] Mr. Ketrzynski, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/SR.418 at 14-15 (1964).

[122] N. LERNER, *supra* note 106, at 46.

[123] *See id.* at 71-73; McDougal, Lasswell & Chen, *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U. L. REV. 919, 1059-60 (1975).

[124] Racial Discrimination Convention, *supra* note 105, at 218.

[125] *Id.* at 214.

The Convention, including article 4, was unanimously adopted by the General Assembly on December 21, 1965.[126] Under U.N. treaty procedure, it entered into force on January 4, 1969, and gathered an increasing number of state signatures over the years.[127] The United States was an early signatory to the convention, consistent with its significant role in drafting and promoting the convention from the earliest stages. In 1978 President Carter submitted the convention to the Senate for ratification.[128] The Senate has taken no significant steps toward ratification. Signature does not bind the United States to the treaty until the signing is ratified. Under the Vienna Convention on the Law of Treaties a state's signature does, however, bind it to refrain from defeating the object of the treaty.[129]

The procedure for signature and ratification allows reluctant states to reserve the right to reject antipropaganda laws that would interfere with the right of free speech.[130] Such states apparently felt that the "due regard" clause of article 4 was not explicit enough to reserve this right.

Some commentators suggest that the United States should not ratify the Convention without explicit reservation to article 4, because the due regard clause is not "a sufficient safeguard for the rights set forth in the First Amendment."[131] In signing the Convention, the United States made a relatively short reservation, stating:

> The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.[132]

This limited reservation indicates the United States' basic position of support for the Convention. Such support is consistent with the

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[126] 20 U.N. GAOR (1406th plen. mtg.) at 7, U.N. Doc. A/PV.1406 (1965).

[127] N. LERNER, *supra* note 106, at 155.

[128] R. LILLICH & F. NEWMAN, *supra* note 110, at 130.

[129] Vienna Convention on the Law of Treaties, *done* May 23, 1969, art. 18, 1155 U.N.T.S. 331, 336.

[130] Racial Discrimination Convention, *supra* note 105, art. 20, at 236.

[131] N. NATHANSON & E. SCHWELB, THE UNITED STATES AND THE UNITED NATIONS TREATY ON RACIAL DISCRIMINATION 8 (Studies in Transnational Legal Policy No. 9, 1975).

[132] *Id.* at 85.

American ideological commitment to equality and with the need to maintain international prestige.[133] The reservation and the failure to ratify the convention separates the United States from an evolving world standard. As discussed below, this position represents an extreme commitment to the first amendment at the expense of antidiscrimination goals.

The Convention is not the only expression of the emerging international view. The need to limit racist hate messages is implicit in basic human rights documents such as the United Nations Charter and the Universal Declaration of Human Rights. Both documents recognize the primacy of the right to equality and freedom from racism.[134] Other human rights treaties, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms[135] and the American Declaration of the Rights and Duties of Man[136] also recognize this primacy. The United States is also a party to an international convention on genocide that forbids, *inter alia,* incitement to genocide.[137] Finally, the existing domestic law of several nations — including states that accept the western notion of freedom of expression — has outlawed certain forms of racist speech.[138]

The United Kingdom, for example, under the Race Relations Act, has criminalized incitement to discrimination and incitement to racial hatred.[139] The Act criminalizes the publication or distribution of "threatening, abusive, or insulting" written matter or use of such language in a public place. The United Kingdom standard originally differed from the international standard in that it required proof of intent to incite to hatred. The intent requirement was later dropped.[140] The Act is consistent with the international standard in that it recognizes that avoiding the spread of hatred is a legitimate object of the law, and that some forms of racist expression are properly criminalized. The legislative history of the Act suggests that the drafters were concerned with the spread of racist violence.[141] Imminent violence, however, was not the only object of the Act. The Act recognized the inevitable connection between the general spread of race hatred and the spread of violence. While commentators have suggested that the Act is ineffective and capable of misuse,[142] the existence of the Act supports the growing international movement toward outlawing racist hate propaganda.

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[133] *Cf.* Dudziak, *Desegregation as a Cold War Imperative,* 41 STAN. L. REV. 61 (1988) (history of linkage between U.S. support for antidiscrimination law and claims of moral superiority to the socialist world).

[134] *See* U.N. CHARTER art. 55(c); Universal Declarion of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

[135] COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS, § 1 (7th ed. 1971).

[136] PAN AMERICAN UNION, FINAL ACT OF THE NINTH INTERNATIONAL CONFERENCE OF AMERICAN STATES 38 (1948).

[137] The Convention of the Prevention and Punishment of the Crime of Genocide, art. 3(c), *adopted* Dec. 9, 1948, 78 U.N.T.S. 277, 280, requires member states to prohibit "[d]irect and public incitement to commit genocide." The Convention was ratified by the United States Senate in 1986 with reservations noting that the United States Constitution would override any provisions of the Convention. 132 CONG. REC. 2349-50 (Feb. 19, 1986).

[138] For an excellent review of European anti-hate speech laws, see Kretzmer, *supra* note 36, at 499-506. Domestic states of the United States have also enacted anti-hate group legislation and constitutional provisions, such as group libel laws. *See, e.g.*, ILL. CONST. art. 1, § 20; FLA. STAT. §§ 876.17-.20 (1987); N.C. GEN. STAT. §§ 14.12-.14 (1986); OKLA. STAT. tit. 21, §§ 1301-1306 (1981).

[139] Race Relations Act of 1965, ch. 73 § 6(1), amended in 1976 and 1986.

Canada has similarly adopted a national statute governing hate propaganda. Sections 318 and 319 of the Canadian Criminal Code[143] outlaw advocacy of genocide, defined as, *inter alia,* an act designed to kill a member of an identifiable group. They also outlaw communications inciting hatred against any identifiable group where a breach of peace is likely to follow. The law further outlaws the expression of ideas inciting hatred if such expression is tied to a probable threat to order.

The new Canadian Bill of Rights incorporates strong protections for freedom of speech and association.[144] Conflict between the new bill of rights and the hate messages legislation has not prevented actions to limit hate speech.[145]

Australia and New Zealand also have laws restricting racist speech,[146] leaving the United States alone among the major common-law jurisdictions in its complete tolerance of such speech.[147] What these laws and the United Nations Convention have in common is that they specify a particularly egregious form of expression for criminalization. All ideas about differences between races are not banned. The definitive elements are discrimination, connection to violence, and messages of inferiority, hatred, or persecution. Thus the entire spectrum of what could be called racist speech is not prohibited. A belief in intellectual differences between the races, for instance, is not subject to sanctions unless it is coupled with an element of hatred or persecution. What the emerging global standard prohibits is the kind of expression that most interferes with the rights of subordinated-group members to participate equally in society, maintaining their basic sense of security and worth as human beings.

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[140] *See* Race Relations Act of 1976, ch. 74, § 70; Kretzmer, *supra* note 36, at 501 (discussing amendment dropping intent requirement because it "made it almost impossible to convict").

[141] I. MacDonald, Race Relations and Immigration Law ¶ 8 (1969).

[142] *See, e.g., id.* at ¶ 203.

[143] R.S.C. ch. C-46, §§ 318, 319 (1985).

[144] Constitution Act of 1982, § 2.

[145] Canadian cases allowing legal restraint of hate speech include Regina v. Keegstra, 19 C.C.C. (3d) 254 (Alta. Q.B.) (1984), and Regina v. Zundel, 31 C.C.C. (3d) 97, 580 O.R. (2d) 129 (Ont. C.A. 1987).

[146] *See, e.g.*, the proposed amendments to the New South Wales Racial Discrimination Act reported in Woomera, June/July 1987, at 1 (allowing group defamation actions for racial slurs). Violent racist groups are gaining in membership and visibility in Australia. *See* Crisp, *Harvest of Hate,* The Bulletin, Apr. 4, 1989, at 42 (Australian *Newsweek*); *see also* J. Griffiths, Conflict in Society: Public Order v. Individual Liberty — Laws Against Incitement to Racial Hatred, Paper Delivered at Asia Pacific Lawyers Association Third General Assembly, Hawaii (Jan. 6-9, 1989) (on file with author) (noting anti-incitement act passed in New Zealand in 1971; Australian Broadcasting Tribunal Radio Programme Standard prohibiting material likely to incite race hatred, and proposed legislation in New South Wales banning hate speech).

The failure of American law to accept this emerging standard reflects a unique first amendment jurisprudence. This jurisprudence is so entrenched in American law that it at first seems irreconcilable with the values given primacy in article 4, such as the values of equality and full participation. In order to discuss the significance of this contradiction, it is necessary to consider the American position of tolerance.

V. THE UNIQUELY AMERICAN APPROACH OF PROTECTION OF RACIST HATE PROPAGANDA: THE CIVIL LIBERTARIAN'S STORY

Many foreign lawyers, including those from countries close to the United States in ideology, are perplexed by the uniquely American approach of protection of racist hate organizations.[148] American citizens themselves express frustration when they find that the Klan and the Nazis are free to march in public places, with publicly financed police protection. This section will state the American position, and attempt to make its strongest case.[149] This is a starting point for exploring the dominant story of racism in American social life, and for showing that the American position is neither inevitable nor sound as a matter of democratic theory, constitutional doctrine, or value.

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[147] Nations outside of the common-law world have also adopted domestic anti-hate speech legislation. Professor Frances Olsen shared with me this law from Sweden:

> If a person publicly or otherwise in a statement or other communication which is spread among the public threatens or expresses contempt for an ethnic group or other such group of persons with allusion to race, skincolour, national or ethnic origin or religious creed, he shall be sentenced for *agitation against ethnic group* to imprisonment for at most two years if the crime is petty, to pay a fine.

SWED. PENAL CODE ch. 16, § 8 (1986). This statute is also discussed in Lasson, *Group Libel Versus Free Speech, When Big Brother Should Butt In*, 23 DUQ. L. REV. 77, 88 (1984).

[148] Author's discussion of racist speech with foreign lawyers.

[149] For a thoughtful judicial exposition of the American position, see Judge Decker's opinion in Collin v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978). While tolerance of hate speech represents dominant first amendment thought, there is a record of thoughtful opposition to this view. *See, e.g.*, Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942) (arguing for legal restriction of racist speech).

By the American position, I refer to the position that would require reservation to article 4 and forbearance from other efforts to control racist speech, on the ground that restriction of racist hate propaganda and hate organizations is incompatible with the first amendment.[150] There is no single authoritative assertion of this position. The discussion here thus addresses a composite of mainstream first amendment thinking.

Getting a clear statement of the American position is not easy. First amendment doctrine is notably confused,[151] but a reading of the cases reveals the following core ideas.[152] Freedom of expression, the argument goes, is the most fundamental right protected under the Constitution. Democratic, representative government presumes that people are free to think and say whatever they might, even the unthinkable. They can advocate the end of democracy. We risk the chance that they will prevail because to give government the power to control expression is an even greater threat. Power is jealous, and the temptation to stifle legitimate opposition is too great.[153] Thus under our system, there is "no such thing as a false idea."[154] All ideas deserve a public forum, and the way to combat anti-democratic ideas is through counter-expression. When all ideas are voiced freely, we have the greatest chance that the right results will obtain.

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[150] *See, e.g.*, Hauser, *United Nations Law on Racial Discrimination*, AM. J. INTL. L., Sept. 1970, at 114, 117 ("The [s]enatorial environment, I fear, would be extremely hostile. Civil libertarian groups that I have spoken to have serious doubt about the convention as well. . . . The ideas in Article 4 fly directly against the American idea of free speech."); N. LERNER, *supra* note 106, at 25-26 ("The long discussion on [a]rticle 4 dealt basically with the problems of freedom of speech and freedom of association, freedoms which are likely to be restricted by the provisions of the Convention."). The American position is exemplified by the results in Brandenburg v. Ohio, 395 U.S. 444 (1969) (free speech rights of Ku Klux Klan leader), and National Socialist Party v. Village of Skokie, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

At least one Supreme Court case has suggested that state group libel statutes directed at racist hate messages are constitutional. *See* Beauharnais v. Illinois, 343 U.S. 250 (1952).

For a survey of commentary suggesting that *Beauharnais* never was or no longer is good law, see 1 N. DORSEN, P. BENDER & B. NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 655-59 (4th ed. 1976). For conflicting views of whether the *Beauharnais* doctrine is still effective, see the majority opinion and dissent in Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

[151] Archibald Cox states in the conclusion to his book on the first amendment that first amendment cases "often lack the full exposition necessary to fit the decisions into a coherent body of law." A. COX, FREEDOM OF EXPRESSION 89 (1981). Laurence Tribe has called current first amendment doctrine a "patchwork quilt of exceptions." L. TRIBE, CONSTITUTIONAL CHOICES 220 (1985).

[152] Professor Frederick Schauer points out that "free speech" is a shorthand for a number of different values and principles. F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982).

[153] *See* National Committee Against Repressive Legislation, Petition to the United States 101st Congress (Jan. 1989) (law professors' petition calling for legislation to curb FBI excesses, including infiltration, warrantless searches, court disruption, and surveillance, all without probable cause or public accountability, infringing on legitimate political activity).

[154] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

We have no way of knowing what the right results are in advance. Ideas that were once accepted as truth we now reject. Because our ideas about what we want as a society are changing and emergent, we cannot say that certain ideas are unacceptable. New ideas often meet opposition, and we have seen new ideas, including major advances in civil rights, eventually become the majority position. We have no basis for distinguishing good from bad ideas, and the only logical choice is to protect all ideas.[155]

If the state feels threatened by certain ideas, it is not without recourse. It can use education and counter-speech to combat those ideas. It can control conduct or action arising from those ideas. Thus while the state cannot outlaw a militaristic political party, it can control the stockpiling of weaponry and punish any acts of violence.[156] Incitement to imminent violence is a related and acceptable point of intervention.[157] Such control is admittedly less effective than direct and preventive repression, but we have made the commitment to a free society, and we will not become un-free even in self-defense. To do otherwise abandons the basic foundation of democracy, rendering nonsensical any claim to necessity. Furthermore, if we accept that ours is a racist society, that is all the more reason to give primacy to the first amendment. The best means to combat racist oppression is the right of protest.[158]

Accepting this extreme commitment to the first amendment is neither easy, nor natural. It is a concept one must learn,[159] and it barely survives the hard cases. There is much speech that comes close to action. Conspiratorial speech, inciting speech, fraudulent speech, obscene speech, and defamatory speech are examples of words that seem to emerge from human mouths as more than ideas. Examples might include a merchant's lies about the efficacy of a product, a gang leader's order to murder an enemy, sexual description broadcast to an audience of children, and threats of physical harm.[160] The American doctrine recognizes a few limited categories of speech that take on qualities beyond expression. These areas are doctrinally distinct,[161] and our commitment to the first amendment value requires the most vigilant scrutiny to avoid suppression of ideas under the guise of controlling conduct.[162]

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[155] Dean Bollinger suggests that possible truth is not a reason for protecting racist speech. L. BOLLINGER, *supra* note 12, at 242-43. Professor Frederick Schauer has also noted that we have relative levels of uncertainty of the truth-value of any given statement, and that low probability of truth is rationally weighed against the harm of certain speech. F. SCHAUER, *supra* note 152, at 15-34. To their credit, most civil libertarians avoid claiming possible truth as a basis for protecting racist speech, arguing instead that racist lies must be protected in order to preserve free speech for all. *See, e.g.*, A. NEIER, *supra* note 36.

[156] Attempts to limit hate group activity typically call forth opposition by civil libertarians. *See, e.g.*, Moore, *Oregon's Paramilitary Activities Statute: A Sneak Attack on the First Amendment*, 20 WILLAMETTE L. REV. 335 (1984) (criticizing 1983 Or. Laws, ch. 792, § 2 (prohibiting paramilitary assembly, training, and display of paramilitary weaponry)).

[157] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (advocacy of violence protected and distinguished from actual, imminent violence).

[158] This point was made by Alan Borovoy, a Canadian civil libertarian, in his speech at the State University of New York at Buffalo School of Law. *Language as Violence*, *supra* note 3, at 339-44. Mr. Borovoy argued that the tactic of creative tension — of causing offense — is essential to civil rights activists. *Id.* at 340.

[159] T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 12 (1970).

What the American position means in the area of race is that expressions of the ideas of racial inferiority or racial hatred are protected. Anyone who wants to say that African Americans and Jews are inferior and deserving of persecution is entitled to. However loathsome this idea may be, it is still political speech. The law becomes strong at its edges. If we can hold fast to freedom when it is most difficult to do so, we will avoid making the easy and disastrous mistakes.

The strongest argument against criminalization of racist speech is that it is content-based.[163] It puts the state in the censorship business, with no means of assuring that the censor's hand will go lightly over "good" as opposed to "bad" speech.[164] Critics cite the Canadian experience of words of protest and satire mistakenly challenged using race-hatred laws,[165] or the British experience, where censorship of racism is accompanied by censorship of political dissidents. If we outlaw the Ku Klux Klan as an organization repugnant to democratic values, then we can outlaw the Communist Party for the same reasons. Admitting one exception will lead to another, and yet another, until those in power are free to stifle opposition in the name of protecting democratic ideals.

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[160] These examples are suggested in *id.* at 18. *See also* Comment, *Coercion, Blackmail, and the Limits of Protected Speech*, 131 U. PA. L. REV. 1469 (1983).

[161] Any categorization of acceptable and unacceptable speech is problematic for civil libertarians. Thus some feminists have argued against antipornography laws, fearing "highly subjective criteria that masquerade as simple, delineating definitions." Brief Amici Curiae of the Feminist Anti-Censorship Taskforce, et al., at 8, American Booksellers Assn. v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (No. 84-3147), *affd. mem.*, 475 U.S. 1001 (1986), *reprinted in* Hunter & Law, *Brief Amici Curiae of the Feminist Censorship Taskforce, et al., in* American Booksellers Association v. Hudnut, 21 U. MICH. J.L. REF. 69, 107 (1988).

[162] Thus the act of flag burning is protected because of the idea embodied in the act. *See* Texas v. Johnson, 109 S. Ct. 2533 (1989).

[163] The *Skokie* court made a strong distinction between conduct and words, suggesting that words that shock because of the idea expressed are absolutely protected from criminal prosecution. Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978). The possibility of a tort action was left open. 578 F.2d at 1206. *See also* Collin v. Smith, 447 F. Supp. 676, 686 (N.D. Ill. 1978) ("defendants have no power to prevent plaintiffs from stating their political philosophy, including their opinions of black and Jewish people, however noxious and reprehensible that philosophy may be").

[164] In speaking on this topic, I've found the most serious objection raised by lawyers in the audiences is that of the slippery slope — that we must never censor because censorship, once allowed, is beyond control. In answer, I acknowledge that this is the central civil liberties concern, and argue that it is as well met by narrowly defining racist speech as it is by other first amendment exceptions. We have already taken those first steps down the icy mountain, we have already abandoned the flat plane of absolutism. *Cf.* Schauer, *Slippery Slopes*, 99 HARV. L. REV.

A related and less persuasive argument is the fresh air position. This position suggests that the most effective way to control the Klan is to allow it to broadcast its ideas. When people are exposed to the hatred propagated by the Klan, they will reject it and organize against it. Suppressing the Klan will only force it to choose more violent and clandestine means of obtaining its goals.[166]

A corollary to the American position of protection of racist expression is that the government must take certain affirmative steps to preserve that right.[167] The state must make public facilities available on a nondiscriminatory basis to individuals and groups wishing to express their race hatred.[168] It must provide police protection to preserve order and protect speakers who are threatened by counter-demonstrators.[169] Since groups like the Klan typically draw angry opposition when they parade in public streets, this has meant that the Klan is entitled to publicly financed police escorts. Without this, the right of

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361 (1985) (discussing slippery slope arguments as logical fallacy. Professor Schauer points out that both sides in any legal argument can make slippery slope claims).

[165] *See Language as Violence*, *supra* note 3, at 341 (in Windsor, Ontario, members of the French minority were prosecuted for publishing a mock anti-French pamphlet intended to show the absurdity of bigotry).

[166] This position is in contradiction to the historical record: escalating racist speech always accompanies escalating racist violence. *See, e.g.*, H. SHAPIRO, *supra* note 73. Where official and community condemnation of hate crimes is swift and vigorous, incidents tend to remain isolated. Where condemnation is not forthcoming, acts of hate tend to escalate. *Cf.* HATE GROUPS, *supra* note 38, at 6 (testimony of Anti-Defamation League of B'nai B'rith comparing the responses to fire bombings of East Haven and West Haven, Connecticut, concluding that to avoid repetition "[t]he people that conduct these kinds of acts must know that the community, the total community, does not support them, that they are pariahs").

[167] T. EMERSON, *supra* note 159, at 627 (chapter entitled "Affirmative Promotion of Freedom of Expression").

[168] Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd., 679 F.2d 64 (5th Cir. 1982) (school board thwarted in effort to stop KKK meeting in gym, but no fees awarded to KKK); Coen v. Harrison County School Bd., 638 F.2d 24 (5th Cir. 1981) (KKK granted permission to use public ball park; no fees against city); Collin v. Chicago Park Dist., 460 F.2d 746 (7th Cir. 1972) (first amendment right of access for Nazis to speak in public park).

[169] *See* Collin v. Smith, 578 F.2d at 1209 ("the governmental interest . . . could more narrowly be served by . . . marshalling local, county, and state police to prevent violations"); *cf.* Invisible Empire v. Mayor, 700 F. Supp. 281 (D. Md. 1988) (costs of police protection for KKK marchers must be borne by the town, not imposed on the marchers themselves); Invisible Empire Knights of the Ku Klux Klan v. City of W. Haven, 600 F. Supp. 1427, 1434 (D. Conn. 1985) (passing on the costs of police protection to marchers would amount to a "hecklers' veto").

free speech is meaningless. Angry and intolerant majorities could prevent unpopular minorities from using public facilities, rendering the right of free speech illusory.

The strong first amendment position outlined above represents certain values[170] that are part of the American structure of government and the American commitment to political and civil rights. The American position may be extreme, but it responds to American circumstances. It recalls the times when our commitment to freedom was tested — the Sedition Act, the McCarthy era, the movement for racial justice, the riots and protests of the Vietnam age. Our commitment to the position has been neither steadfast nor universal.[171] Judges have sometimes failed to understand it, resulting in loose doctrinal ends.[172] The basic principle, however, has survived, and the thrust of the cases and commentary supports first amendment primacy.

The purpose of stating the strongest possible case for the American position is not merely to set the groundwork for an attack. The basic values of freedom of expression, while not provable in any natural law sense, are accepted by the international community. That the American commitment to the ideology of freedom has contributed to social progress and the limitation of repression is a part of our history.[173] The question presented here is whether the values of the first amendment are in irresolvable conflict with the international movement toward elimination of racist hate propaganda, and whether any attempt to move United States law toward the international standard is worthwhile.

As a starting point in understanding what is really going on in the law of freedom of expression, it is helpful to note where the edges are.

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[170] Thomas Emerson, in his statement of the American position, identifies these values:

(1) Self-fulfillment, or the idea that each individual has the right to "his character and potentialities as a human being."

(2) Advancement of knowledge and discovery of truth, through free and vigorous exchange of a wide spectrum of ideas.

(3) Participation in political decisionmaking, which requires both access to knowledge and the right to express an opinion.

(4) Obtaining a stable community — by resolving conflict in the arena of open exchange of ideas. This promotes flexibility, gives everyone a stake in the process, and avoids the violent movement for change that would result from repression.

T. Emerson, *supra* note 159, at 6-7.

[171] *See* B. Schultz & R. Schultz, It Did Happen Here: Recollections of Political Repression in America (1989).

[172] For a laudable effort to conceptualize and clarify the underpinnings of existing doctrine, see Sunstein, *supra* note 66.

[173] For cases close to home, see those upholding the free speech rights of lawyers, *e.g.*, *In re* Sawyer, 360 U.S. 622 (1959) (lawyer reinstated after disbarment for vigorous protest against Smith Act trials).

There are several forms of speech that are not entitled to the same protection that existing doctrine would afford racist propaganda.

In the area of commerce and industrial relations, expression is frequently limited.[174] False statements about products,[175] suggestions that prices be fixed,[176] opinions about the value of stock,[177] and pro-employer propaganda during union elections,[178] are all examples of expressions of ideas that are limited by the law. An instrumental analysis might be that smooth operation of the entities of commerce, and the need for a stable setting for the growth of capital, have overcome the commitment to civil liberties in these instances. A doctrinal first amendment explanation is that those are examples of hard cases, representing more than the expression of an idea. Some statements are noncommunicative acts, subject to legal restraint.[179] Alternatively, some would argue that many existing exceptions are simply a mistake.

Speech and associational rights are limited in certain professional contexts. Government employees are forbidden from engaging in political activity to avoid problems of undue influence.[180] Those charged with the public trust are asked to profess loyalty to the Constitution,[181] and are asked to limit expression that will undermine their ability to do their job.[182] The class of less-favored speakers has included, dubiously, children[183] and prisoners.[184] These exceptions suggest that internal security and the functioning of government are other policies that override the first amendment in specific cases, to the legitimate discomfort of committed civil libertarians.

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[174] See Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181 (1988) for the suggestion that the value of free speech is weakened by incremental decisionmaking on peripheral subjects such as commercial speech.

[175] *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 447 U.S. 557, 566 (1980). *See generally* Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965) (false advertising); Note, *Constitutional Realism: Legislative Bans on Tobacco Advertisements and the First Amendment*, 1986 U. ILL. L. REV. 1193.

[176] Sherman Anti-Trust Act, 15 U.S.C. § 1 (1982).

[177] Securities Act of 1933 as amended, 15 U.S.C. §§ 77a-77aa (1982 & Supp. 1989) (imposing liability for misleading statements in connection with the sale of securities).

[178] Courts have recognized that in the labor context, employer speech can have a coercive effect upon employees who fear economic reprisal. Thus the employer's right to free speech is balanced against the employee's right to organize. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (applying 29 U.S.C. § 158). A major premise of the national labor law scheme is that collective bargaining promotes labor peace and economic development.

[179] Professor John Hart Ely has explored the difference between the restraint of acts and the restraint of communication, searching for the commmunicative elements of certain acts. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975). For elaboration of the content/act distinction, see Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

[180] *See* 5 U.S.C. §§ 1501-1508 (1982) (regulating political activity of certain state and local employees); 5 U.S.C. §§ 7321-7328 (1982) (governing political activities of federal employees).

[181] *See, e.g.*, Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967), *affd. per curiam*, 390 U.S. 36 (1968).

[182] *See* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985); Connick v. Myers, 461 U.S. 138 (1983).

[183] *See* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (censorship of student-

The override occurs again in the area of privacy and defamation. Expressing intimate and private facts about a private individual is subject to civil damages, as is the spread of untruths damaging to both public and private figures.[185] First amendment protections are worked into the law of defamation and privacy, but they are not allowed to supersede completely the reputational interest and personal integrity of the victims of certain forms of expression. When courts are called into private disputes about defamatory speech, they are really mediating between competing interests of constitutional dimension: the right of expression, and the implicit right to a measure of personal integrity, peace of mind, and personhood.

Speech infringing on public order is another classic unprotected area. Bomb threats, incitements to riot, "fighting words,"[186] and obscene phone calls are a few of the speech-crimes that slip through the first amendment's web of protection. These categories edge close to the category of racist speech.[187] Under existing law, insults of such dimension that they bring men — this is a male-centered standard — to blows are subject to a first amendment exception.[188] The problem is that racist speech is so common that it is seen as part of the ordinary jostling and conflict people are expected to tolerate, rather than as fighting words.[189] Another problem is that the effect of dehumanizing

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run school newspaper allowed); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (censorship of sexual innuendo in student's campaign speech to a school assembly allowed).

[184] *See* Thornburgh v. Abbott, 109 S. Ct. 1874 (censorship of incoming mail allowed); Pell v. Procunier, 417 U.S. 817, 822 (1974) ("a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the penological objectives of the system").

[185] *See* New York Times v. Sullivan, 376 U.S. 254 (1964) (limitation on defamation actions by public officials); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (defamation action by private figure); Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976) (publication of true private facts).

[186] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (limitation of speech and insults that provoke violence).

[187] *See* Rabinowitz, *Nazis in Skokie: Fighting Words or Heckler's Veto?*, 28 DE PAUL L. REV. 259 (1979) (arguing that displaying swastika before individuals with known susceptibility to severe emotional distress because of past persecution falls within "fighting words" doctrine); *see also* Vietnamese Fishermen's Assn. v. Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Tex. 1982) (injunction against Klan demonstrations and paramilitary training designed to intimidate Vietnamese shrimpers falls within "fighting words" doctrine).

[188] *But see* Cohen v. California, 403 U.S. 15 (1971).

[189] *See, e.g.*, Vaughn v. Pool Offshore Co., 683 F.2d 922 (5th Cir. 1982) (use of word n—r and aggressive physical hazing and racist slurs were considered typical of offshore oil rig banter and "male interaction," and hence not violative of Title VII.) *See also* Howard v. National Cash Register Co., 388 F. Supp. 603, 606 (S.D. Ohio 1975) (listing racist slurs as part of the historical "language of the factory").

racist language is often flight rather than fight.[190] Targets choose to avoid racist encounters whenever possible, internalizing the harm rather than escalating the conflict. Lack of a fight and admirable self-restraint then defines the words as nonactionable.[191] When racist leaflets threatening Representative Tyrone Brooks urged whites to band together to keep civil rights activists out of Rome, Georgia, state officials felt that the first amendment prevented arrest because the leaflet "didn't threaten to kill anyone."[192]

While it is sometimes suggested that the first amendment is absolute, even strong civil libertarians are likely to admit that the absolutist view is unworkable.[193] As Professor Frederick Schauer has pointed out, absolute protection of expression would render unconstitutional "all of contract law, most of antitrust law, and much of criminal law."[194] The need to distinguish protected from unprotected speech is inevitable.

If there are important competing interests represented in the international position on elimination of racist hate messages, if these interests are only met by limiting speech, and if the speech represented in racist hate propaganda is not the kind of speech most needful of protection, then it may be possible to remain true to the first amendment without protecting racist hate propaganda.

The following section will suggest that an explicit and narrow definition of racist hate messages will allow restriction while respecting first amendment values.

VI. NARROW APPLICATION AND PROTECTION OF FIRST AMENDMENT VALUES

This Article attempts to recognize and accommodate the civil libertarian position. The victim's perspective requires respect for the idea of rights, for it is those on the bottom who are most hurt by the absence of rights, and it is those on the bottom who have sustained the struggle for rights in American history.[195] The image of book burnings should unnerve us and remind us to argue long and hard before selecting a class of speech to exclude from the public domain.[196] I am uncomfortable in making the suggestions made in this section if others fall too easily into agreement.

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[190] Or, to deny it. *See supra* note 87.

[191] As the draft comments to the Stanford University Fundamental Standard Interpretation on Free Expression and Discriminatory Harassment pointed out, it is unfair to use victims' disciplined practice of nonviolence or their demoralized, passive state as proof that insults are not "fighting words." Stanford University, Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment 6 (Final Draft passed Apr. 12, 1989) [hereinafter Fundamental Standard] (on file with author).

[192] HATE GROUP ACTIVITY, *supra* note 61, at 27.

[193] For suggestion of an absolutist position, see New York Times v. Sullivan, 376 U.S. 254, 293-97 (1964) (Black, J., concurring).

[194] Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270 (1981).

In order to respect first amendment values, a narrow definition of actionable racist speech is required. Racist speech is best treated as a *sui generis* category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse.[197] The courts in the *Skokie* case[198] expressed doubt that principles were available to single out racist speech for public limitation. This section attempts to construct a doctrinal and evidentiary world in which we might begin to draw the lines the *Skokie* courts could not imagine.

The alternative to recognizing racist speech as qualitatively different because of its content is to continue to stretch existing first amendment exceptions, such as the "fighting words" doctrine and the "content/conduct" distinction.[199] This stretching ultimately weakens the first amendment fabric, creating neutral holes that remove protection for many forms of speech. Setting aside the worst forms of racist speech for special treatment is a non-neutral, value-laden approach that will better preserve free speech.

In order to distinguish the worst, paradigm example of racist hate messages from other forms of racist and nonracist speech, three identifying characteristics are suggested here:

1. The message is of racial inferiority;

2. The message is directed against a historically oppressed group; and

3. The message is persecutorial, hateful, and degrading.

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[195] For an elaboration of this point, see Matsuda, *supra* note 20, at 323.

[196] *Cf.* Board of Educ. v. Pico, 457 U.S. 853, 879 (1982) (Blackmun, J., concurring) ("school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them").

[197] Professor David Kretzmer has argued that racism is unique for two reasons: the "catastrophic historical experience" and the "universal formal condemnation." Kretzmer, *supra* note 36, at 458.

[198] Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), *aff'd.*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); Village of Skokie v. National Socialist Party, 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977), *modified*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

[199] *See* Vietnamese Fishermen's Assn. v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 208 (1982) (using "conduct" and "fighting words" distinctions to limit Klan activity).

Making each element a prerequisite to prosecution prevents opening of the dreaded floodgates of censorship.

The first element is the primary identifier of racist speech: racist speech proclaims racial inferiority and denies the personhood of target group members. All members of the target group are at once considered alike and inferior.

The second element attempts to further define racism by recognizing the connection of racism to power and subordination. Racism is more than race hatred or prejudice. It is the structural subordination of a group based on an idea of racial inferiority. Racist speech is particularly harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship.

The final element is related to the "fighting words" idea. The language used in the worst form of racist speech is langauge that is, and is intended as, persecutorial, hateful, and degrading.

Part VII, below, applies these three elements to hypothetical cases. Using these elements narrows the field of interference with speech.[200] Under these narrowing elements, arguing that particular groups are genetically superior in a context free of hatefulness and without the endorsement of persecution is permissible. Satire and stereotyping that avoids persecutorial language remains protected. Hateful verbal attacks upon dominant-group members by victims is permissible. These kinds of speech are offensive, but they are, in respect of first amendment principles, best subjected to the marketplace of ideas. This is not to suggest that we remain silent in the face of offensive speech of this type. Rather, the range of private remedies — including counter-speech, social approbation, boycott, and persuasion — should apply.[201]

If the most egregious, paradigmatic racial hate messages are not properly left to private remedy, it is important to explain why. One way to explain this is to consider the difference between racist hate messages and Marxist speech. Marxist speech is the kind of unpopular political expression the first amendment is intended to protect. Marxist speech is, according to a once prevalent view, the advocacy of overthrow of existing governments, inevitably leading to dictatorships and persecution of dissidents and capitalists. It is thus, it was argued, dangerous speech, properly censored. The legacy of this view was McCarthyism and the shattered lives of hundreds of decent citizens.[202]

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[200] Another narrowing device is an intent test. The requisite intent suggested under this scheme is an intent to speak to an audience — "publication" in the common law scheme — and actual or imputed — "should have known" — knowledge of the offensive character of the words. Others have suggested broader definitions of racist speech, using "intent to defame" as the test. *See* Lasson, *supra* note 147, at 126. Narrow and clear definition is consistent with the overbreadth doctrine: any rule that prohibits unprotected speech but that could also prohibit protected speech is unconstitutional. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 520-21 (1972).

[201] The ability to discuss and deal privately with some forms of offensive language is shown in a recent exchange between B'nai B'rith International and the American-Arab Anti Discrimination Committee ("ADC"). The ADC objected to a fundraising letter that alleged that "Arab money is pouring into college campuses" and that "the Arab presence . . . is poisoning the minds of our young people." *B'nai B'rith Apologizes for Letter Containing Anti-Arab Statements*, N.Y. Times, Feb. 10, 1989, at 14, col. 4. Letters of protest from the ADC, New Jewish Agenda, and various church groups resulted in withdrawal of the offensive letters. *Id.*

How can one argue for censorship of racist hate messages without encouraging a revival of McCarthyism? There is an important difference that comes from human experience, our only source of collective knowledge. We know, from our collective historical knowledge, that slavery was wrong. We know the unspeakable horror of the holocaust was wrong. We know white minority rule in South Africa is wrong. This knowledge is reflected in the universal acceptance of the wrongness of the doctrine of racial supremacy. There is no nation left on this planet that submits as its national self-expression the view that Hitler was right.[203] South Africa is alone[204] in its official policy of apartheid, and even South Africa, in making its case to the world community, is careful to avoid an explicit ideology of racial supremacy, preferring instead the rhetoric of one-step-at-a-time. At the universities, at the centers of knowledge of the international community, the doctrines of racial supremacy and racial hatred are again uniformly rejected. At the United Nations the same is true. We have fought wars and spilled blood to establish the universal acceptance of this principle. The universality of the principle, in a world bereft of agreement on many things, is a mark of collective human progress. The victim's perspective, one mindful of the lessons of history, thus accepts racist speech as *sui generis* and universally condemned.

Marxist speech, on the other hand, is not universally condemned. Marxism presents a philosophy for political organization, distribution of wealth and power, ordering of values, and promotion of social change. By its very content it is political speech going to the core of ongoing political debate. Many nations adhere to Marxist ideology, and it is impossible to achieve world consensus either for or against this view. Marxists teach in universities. While Marxist ideas are rejected and abhorred by many, Marxist thought, like liberal thought, neoconservative economic theory, and other conflicting structures for understanding life and politics, is part of the ongoing efforts of human beings to understand their world and improve life in it.

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[202] *See* E. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES (1986). For a moving account of the effects of McCarthyism on one family, see K. CHERNIN, IN MY MOTHER'S HOUSE (1983).

[203] The uniform rejection of racist ideology is evidence of moral truth. I suggest more than an opinion poll test. I suggest as well that the doctrine of racial supremacy is wrong, both morally and factually, and that the consensus of human opinion helps us to know this.

[204] *Cf.* Derrida, *Racism's Last Word*, HARPER'S, Feb. 1986, at 21, 22 (the word "apartheid" described as "the death rattle of what is already an interminable agony, something like the setting in the West of racism").

What is argued here, then, is that we accept certain principles as the shared historical legacy of the world community. Racial supremacy is one of the ideas we have collectively and internationally considered and rejected. As an idea connected to continuing racism and degradation of minority groups, it causes real harm to its victims. We are not safe when these violent words are among us.

Treating racist speech as *sui generis* and universally condemned on the basis of its content and the harmful effect of its content is precisely the censorship that civil libertarians fear. I would argue, however, that explicit content-based rejection of narrowly defined racist speech is more protective of civil liberties than the competing-interests tests or the likely-to-incite-violence tests that can spill over to censor forms of political speech.[205]

Looking again to the emerging outsider jurisprudence, I derive basic principles: the need to fight racism at all levels, the value of explicit formal rules, and a fear of tyranny. These principles suggest the wisdom of legal intervention with only a narrowly defined class of racist hate propaganda.[206]

A range of legal interventions, including the use of tort law and criminal law principles, is appropriate to combat racist hate propaganda.[207] While the value of free speech can guide the choice of procedure — including evidentiary rules and burdens of persuasion — it should not completely remove recourse to the institution of law to combat racist speech. Racism as an acquired set of behaviors can be dis-acquired,[208] and law is the means by which the state typically provides incentives for changes in behavior.

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[205] Courts have rejected statutes that cast too wide a net over forms of expression. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1 (1949) (city ordinance banning speech that brings about unrest is over-broad).

[206] Examples of the kind of over-broad statutes drafted to avoid regulation of racist content include "secret society" laws. *See, e.g.*, New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928) (upholding a state law requiring all organizations to register and submit membership lists to the state, as used against KKK membership).

[207] In addition to judicial modification of first amendment analysis, the forms of remedy could include creation of a new crime of racist speech, enhanced sentencing for existing crimes where racial motivation is found, administrative mechanisms for fines and injunctive relief, civil actions for damages, or a combination of the above. *Compare* CAL. CIV. CODE § 51.7 (West 1989) (civil remedies for violence motivated by racial hatred) *and* CAL. CIV. CODE § 52.1 (West 1989) (remedies for deprivation of rights motivated by racial hatred) *and* CAL. PENAL CODE §§ 422.6-.9 (West 1988) (criminal penalties for deprivation of rights because of race) *and* CAL. PENAL CODE § 1170.75 (West 1988) (racial animus an aggravating factor in felony sentencing) *with* OHIO REV. CODE ANN. § 2927.12 (Baldwin 1989) (creating a crime of "ethnic intimidation" for violent and property crimes committed because of race) *and* WIS. STAT. ANN. § 939.645 (West Supp. 1988) (raising penalties for crimes committed because of race) *and* WIS. STAT. ANN. § 943.012 (West Supp. 1988) (creating crime for damaging religous property).

VII. HARD CASES

> *In order to get beyond racism, we must first take account of race. There is no other way.*[209]
>
> *Of course I emphasize different things, Doctor, because history has treated my people differently from yours.*[210]

This section will consider stories at the edge, a tentative discussion of problem cases that may arise under the definition of actionable racist speech discussed here. The connecting thread in these examples is the need for clarity about the historical context in which racist speech arises, and attention to the degree of harm experienced by targets of different kinds of racist speech.

A. *A Case of the Angry Nationalist*

Expressions of hatred, revulsion, and anger directed against historically dominant-group members by subordinated-group members are not criminalized by the definition of racist hate messages used here. Malcolm X's "white devil" statements — which he later retracted — are an example.[211] Some would find this troublesome, arguing that any attack on any person's ethnicity is harmful. The harm and hurt is there, but it is of a different degree. Because the attack is not tied to the perpetuation of racist vertical relationships, it is not the paradigm worst example of hate propaganda. The dominant-group member hurt by conflict with the angry nationalist is more likely to have access to a safe harbor of exclusive dominant-group interactions. Retreat and reaffirmation of personhood are more easily attained for historically non-subjugated-group members.

While white-hating nationalist expressions are troublesome both politically and personally, I would interpret an angry, hateful poem by a person from a historically subjugated group[212] as a victim's struggle for self-identity in response to racism.[213] It is tied to the structural domination of another group.[214] Part of the special harm of racist speech is that it works in concert with other racist tools to keep victim groups in an inferior position.[215] Should history change course, placing former victim groups in a dominant or equalized position, the newly equalized group will lose the special protection suggested here for expression of nationalist anger.

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[208] *See* W. SEDLACEK & G. BROOKS, *supra* note 68, at 8-10.

[209] Regents of the Univ. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).

[210] Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?* (Review Essay), 97 YALE L.J. 923, 937 (1988).

[211] MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 251-52, 363 (1966); *see also* Gannon v. Action, 303 F. Supp. 1240 (E.D. Mo. 1969) (African-American activists interrupt church services with taunts against "white Christian racists"); HATE GROUP ACTIVITY, *supra* note 61, at 17 (report of Iman Pilamen El Amin, Social Iman of the Atlanta Muslim Mission, describing the evolution of the American Muslim Mission since its 1975 adoption of the ideology of the oneness of all humanity, and abandonment of the white devil idea).

Critics of this proposal ask how one knows who is oppressed and who isn't. Poor whites, ethnic whites, wealthy ethnics — the confusing examples and barriers to classification abound. The larger question is how anyone knows anything in life or in law. To conceptualize a condition called subordination is a legitimate alternative to denying that such a condition exists.[216] In law, we conceptualize. We take on mammoth tasks of discovery and knowing. We can determine when subordination exists by looking at social indicators: wealth, mobility, comfort, health, and survival tend to mark the rise to the top and fall to the depths.[217] The rise and fall of group status is relevant even when an individual is a counterexample, because when the group is subordinated, even the lucky counterexample feels the downward tug.[218] Luck is not the same as privilege.

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[212] *See, e.g.*, Trask, *racist white woman*, BAMBOO RIDGE, Fall 1987, at 86.

[213] Nationalism may be an interim stage on the path to egalitarian vision. *See* Sizemore, *Separatism: A Reality Approach to Inclusion*, in RACIAL CRISIS IN AMERICAN EDUCATION 249 (R. Green ed. 1969).

[214] In an analogous context, the work of Catharine MacKinnon recognizes subordination of women and calls for laws addressing that subordination. *See, e.g.*, C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979). Christine Littleton points out that the subordination approach differs significantly from the inequality approach. Inequality calls for equal treatment. Subordination calls for an uplifting of women from a degraded status. *See* Littleton, *supra* note 31, at 768.

[215] An understanding of relative power is implicit in Beauharnais v. Illinois, 343 U.S. 250, 252 (1952) (allowing action against pamphlet calling for the "white people in Chicago to unite" against becoming "mongrelized" and against "the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro") (omission in original), in Brown v. Board of Educ., 347 U.S. 483 (1954) (recognizing that segregation carries a message of African-American inferiority), and in New York Times v. Sullivan, 376 U.S. 254, 293-97 (1964) (Black, J., concurring) (speech rights of African-American civil rights protesters upheld against libel action by white sheriff). These cases, decided against a subtext of racial subordination, reveal the Court struggling to design neutral rules to deal with a decidedly unequal context, and siding with the subordinated group in each case. Justice Black in his *Beauharnais* dissent warned that the Court was taking a step toward censorship of legitimate social protest including protest by minorities. *New York Times* is, in a sense, a rejoinder to Justice Black.

[216] *Cf.* Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (arguing for primacy of antisubordination principle over a neutral equality principle).

[217] *See, e.g.*, Delgado, *supra* note 210, at 938-41 & nn.88-111 (documenting statistical and historical evidence of subordination of nonwhites); Scales-Trent, *supra* note 17 (documenting degraded social status of African-American women).

In some cases, a group's social well-being may improve, while their victimization continues. Asians who experience economic success are often underemployed relative to their talents.[219] Jews who attain equality in employment still experience anti-Semitic vilification, harassment, and exclusion.[220] Catholics are relatively free from discrimination in some communities, and subject to vile bigotry in others.[221] Evidence of the relative subjugation of various groups is available to factfinders.[222]

In the same way that lawyers martial evidence in an adversarial setting to find facts in other areas of law, we can learn to do the same to know the facts about subordination, and to determine when hate speech is used as an instrument of that subordination.[223]

B. *First Variation: Anti-Semitism and Racism by Non-Whites*

What of hateful racist and anti-Semitic speech by non-whites? The phenomena of one subordinated group inflicting racist speech upon another subordinated group is a persistent and touchy problem. Similarly, members of a subordinated group sometimes direct racist language at their own group. The victim's privilege becomes problematic when it is used by one subordinated person to lash out at another. While I have argued here for tolerance of hateful speech that comes from an experience of oppression, when that speech is used to attack a subordinated-group member, using language of persecution, and adopting a rhetoric of racial inferiority, I am inclined to prohibit such speech.

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[218] Minority law professors, typically privileged by class and education, still trade story after story of police harassment, racist insult, and white hostility. R. DELGADO, MINORITY LAW PROFESSORS' LIVES: THE BELL-DELGADO SURVEY (Institute for Legal Studies Working Papers Series 3:9, 1988); *cf.* Fiss, *Groups and the Equal Protection Clause,* 5 PHIL. & PUB. AFF. 107, 148-49 (1976) (well-being and status of individuals is related to the status of the individual's group).

[219] *See* Kim & Hurh, *Korean Americans and the "Success" Image: A Critique,* AMERASIA J., Fall/Winter 1983, at 3.

[220] *See, e.g.,* HATE GROUP ACTIVITY, *supra* note 61, at 13 (noting several instances of threats and attacks directed at Jews in Georgia including cross burnings, synagogue vandalism, bomb threats, and regular harassment of congregations leaving worship — including a car veering off the road to threaten teenagers leaving services, BB gun shooting at Passover, and verbal taunts such as "Hitler still lives").

[221] *See id.* at 17 (noting resurgence of anti-Catholic bigotry in Georgia).

[222] For an argument that African-American women require heightened legal protection beyond that of white women or African-American men because of the historical circumstances of their two statuses that "have often combined in ways which are not only additive, but synergistic — that is, they create a condition for black women which is more terrible than the sum of their two constituent parts," see Scales-Trent, *supra* note 17, at 9.

[223] See HATE GROUP ACTIVITY, *supra* note 61, for an example of a formal effort to amass testimony on the reality of racism in one locality.

History and context are important in this case because the custom in a particular subordinated community may tolerate racial insults as a form of word play.[224] Where this is the case, community members tend to have a clear sense of what is racially degrading and what is not. The appropriate standard in determining whether language is persecutorial, hateful, and degrading is the recipient's community standard. We should avoid further victimization of subordinated groups by misunderstanding their linguistic and cultural norms.

C. *Second Variation: Zionism*

I reject the sweeping charge that Zionism is racism and argue instead for a highly contextualized consideration of Zionist speech. To the extent any racial hostility expressed within a Zionist context is a reaction to historical persecution, it is protected under the doctrinal scheme suggested in this Article. Should white Zionists ever lose the victim's privilege? If Zionist speakers are white, do hateful, race-bound expressions of theirs necessarily reinforce historical conditions of white dominance over brown and black people? The analysis must turn on the particular context. If a Zionist's expression of anger includes a statement of generic white supremacy and persecution, the speaker chooses to ally with a larger, historically dominant group, and the victim's privilege should not apply. On the other hand, angry, survivalist expression, arising out of the Jewish experience of persecution and without resort to the rhetoric of generic white supremacy, is protected under the contextualized approach. Again, it is important to add that the various subordinated communities are best equipped to analyze and condemn hate speech arising within their midst.[225]

D. *The Case of the Dead-Wrong Social Scientist*

Another difficult case is that of the social scientist who makes a case for racial inferiority in an academic setting based on what is presented as scientific evidence. Various theories of genetic predisposition to violence, cultural lag, and race/intelligence correlation fall into this category.[226] Critics note that these pseudo-scientific, Eurocentric theories are racist and ignorant.[227] This raises two separate questions. First, should such views receive an audience and a forum in an academic setting? Second, should we criminalize expressions of such views?

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[224] *See, e.g.*, C. STACK, ALL OUR KIN 16 (1974) (discussing acceptable racial teasing between African-American informants and a white anthropologist).

[225] I thus defer to the evolving judgment of the American and Israeli Jews and seek dialogue with them on statements emerging from the Israeli far right. *Cf. Racism from the Right*, NEWSWEEK, Sept. 3, 1984, at 44 (quoting Meir Kahane as stating, "I don't want to lose my country to Arab bullets or Arab babies" to supporters' shouts of "Death to Arabs!").

[226] *See, e.g.*, Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 5 HARV.

As to the first question, the answer may well be no. Not all views deserve the dignity of an academic forum. Poorly documented, racially biased work does not meet the professional standards required of academic writing. If a writer manages to come up with a theory of racial inferiority supported by credible evidence, that theory may deserve a forum. Under the principle of academic freedom, ignorant views need not be heard, but unpopular academically tenable views should be.

As to the second question, outlawing this type of speech might be inappropriate.[228] Assuming the dead-wrong social-science theory of inferiority is free of any message of hatred and persecution, the ordinary, private solution is sufficient: attack such theories with open public debate, and with denial of a forum if the work is unsound in its documentation.

E. *The Case of Wordless Speech: Symbols and Regalia, Text and Context*

There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups.[229] The swastika, the Klan robes, the burning cross are examples of signs — like all signs — that have no meaning on their own, but that convey a powerful message to both the

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EDUC. REV. 1 (1969) (concluding that African Americans' lower IQ scores are due, in part, to genetic factors). *But see* S. GOULD, THE MISMEASURE OF MAN (1981) (crtiquing various pseudo-scientific claims of racial superiority).

[227] *See A Theory Goes On Trial*, TIME, Sept. 24, 1984, at 62 (Dr. Shockley, who admits subscribing to the white supremacist publication "Thunderbolt," is called "nearly incompetent" by trained geneticist).

[228] *Compare* Lasson, *supra* note 147, at 127 (arguing for restraint of Shockley's conclusions) *with* Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1978) (suggesting revival of group defamation doctrine but arguing that statements of opinion, such as Shockley's, should be protected). The Yale Note is an attempt to penalize a limited class of racist speech, using common law principles such as the fact-opinion distinction, obloquy, and prurient interest. Such tests are tailored to the problems of obscenity and defamation, and do not adequately, in this author's opinion, confront the complexity of racist speech.

[229] *See* Danon, *The Illinois Supreme Court and the Appellate Decisions Regarding Prior Restraint, in* Skokie v. The American Nazi Party, 67 ILL. B.J. 540, 541 (1979) (arguing that patterning conduct, uniform, slogan, and language after German Nazi Party "is equivalent of encouragement to identify with the genocide of the Jews and an indirect incitement to follow Hitler's 'final solution' "); Lasson, *supra* note 147, at 127 (arguing for limitation of swastika displays on a group libel theory).

user and the recipient of the sign in context.[230]

Here we must look to the history of these signs to understand what they mean. If the historical message, known to both victim and perpetrator, is racist persecution, then the sign is properly treated as actionable racist speech.[231]

F. *The Cold Version of the Classic Forms of Anti-Semitism*

Anti-Semitic literature is one of the most highly developed and despicable forms of hate propaganda. A significant problem with the test proposed here is that it may, at first blush, seem too narrow to cover some chillingly sterile brands of anti-Semitic literature. The monetary conspiracy theories, the tales of mysterious cartels, the revisionist histories distributed by anti-Semitic hate groups are sometimes cunningly devoid of explicit hate language.[232] Here is another story:

> *One recent summer, after giving a talk advocating restriction of hate speech, I was dutifully catching up on reading of academic junk mail — newsletters, book announcements, requests for contributions. I picked up a leaflet, professionally printed and attributed to an academic institution, and began reading what looked like a mildly interesting historical essay. It was only after several paragraphs that I realized I was reading a holocaust hoax tract. My heart started racing as soon as I realized what a horrible thing I held in my hand. I felt fear and revulsion that I was targeted to receive this mail, and that it was written in such a way that I didn't immediately recognize it for what it was. I fished in the rubbish can for the envelope and found it had no return address — that should have been the tip-off. The California postmark gave me some relief. At least the writers were not in my immediate neighborhood. The fear, however, remains, and I am more cautious about where and to whom I will speak on this topic that brings hate to my desk.*

I am inclined to criminalize the cold-blooded version of anti-Semitic literature. Given the historical record, this "cold" version is just as hateful, for all its tone of distorted rationality, as the "hot" name-calling versions. To call the holocaust a myth is to defame the dead, as Elie Wiesel has so eloquently put it.[233] It is a deep harm to the living. In a range of different contexts, the common law has recognized the likelihood of emotional harm to the living from carelessness in treatment of the dead.[234]

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[230] *See* National Alliance Against Racist and Political Repression, *Draft Legislation to Stop Racist Hate Group Activity*, 44 GUILD PRAC. 131 (1987) (recognizing that white-hooded robes and masks, burning crosses, and swastikas are associated with acts of violence, and suggesting criminal and civil penalties for their use).

[231] *See, e.g.*, MD. ANN. CODE of 1957 art. 27, § 10A (1987) (prohibition of cross burning without notice to authorities).

[232] *Cf.* Taylor v. Canada, 4 HUM. RTS. L.J. 193 (UN-Hum. Rts. Comm. 1983) (prosecution under Canadian law for recorded telephone message alleging that Jewish conspiracy would lead to financial collapse allowed); *see also* CIVIL RIGHTS DIVISION, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, SPECIAL EDITION: THE LIBERTY LOBBY NETWORK (1987) (analyzing pseudo-intellectual anti-Semitic groups); Note, *supra* note 228, at 331 & n.106 (discussing the *Protocols of the Learned Elders of Zion*, "a classic of anti-Semitic literature").

The element of hatred and degradation is present in the monetary conspiracy theory and holocaust hoax literature. Like the swastika, these texts take their hateful meaning from their historical context and connection to violence. To anyone who knows that context they cause legitimate distress.

G. *Collections, Museums, Neutral Reportage, Humor, and Literary Realism*

> *YES! Send me The SS,* to examine for 10 days free, as my introduction to THE THIRD REICH.[235]

There are instances in which hate propaganda is deliberately spread by persons who are not themselves hatemongers. There are groups that preserve and disseminate hate propaganda for the purpose of educating the public of the evils of racism and anti-Semitism.[236] There are groups and individuals who collect racist memorabilia for reasons of collectability, sometimes also claiming an educative function, and other times for reasons of fondness for ephemeras of evil. There are news reporters who repeat racist speech in order to report the news of its utterance, law professors who repeat racist words in hypotheticals for class discussion of the first amendment. In these cases the hate message is spread for purposes other than persecution. The hateful message is once removed from direct transmission by a buffer zone of a nonpersecuting presenter.

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[233] Address by Elie Wiesel, Hofstra University Conference on Group Defamation and Freedom of Speech (Apr. 20, 1988).

[234] *See, e.g.*, Kirker v. Orange County, 519 So. 2d 682 (Fla. Dist. Ct. App. 1988) (cause of action against medical examiner for removing body parts without survivor's permission); Ingaglio v. Kraeer Funeral Home, Inc., 515 So. 2d 428 (Fla. Dist. Ct. App. 1987) (cause of action for emotional distress for malicious mishandling of deceased husband's remains); *The Neptune Society Cases*, 31 ATLA L. Rep. 223 (Sacramento County Super. Ct., Feb. 22, 1988) (settlement for failure to properly cremate and scatter remains as promised).

Desecration of graves and memorials is a common tactic of hate groups. *See, e.g.*, ATTORNEY GENERAL'S REPORT, *supra* note 47, at 44 (desecration of memorial to a murdered Vietnamese youth in Davis, California); HATE GROUP ACTIVITY, *supra* note 61, at 14 (spray painting of Martin Luther King, Jr., crypt); HATE GROUPS, *supra* note 38, at 4 (in Connecticut, a statue of Martin Luther King, Jr., and a Holocaust memorial were defaced).

[235] From a clip-out coupon in a two-page advertisement for a Time-Life book series, SPORTS ILLUSTRATED, Feb. 6, 1989, at 42-43. The ad included portraits of S.S. figures and a small, color highlighted swastika in the lower left-hand corner. It in no way suggested approval of S.S. activities, although it did make me uneasy in its tone of fascination.

[236] *See* SIMON WIESENTHAL CENTER, RESPONSE, *supra* note 58, at 4-5 (reprinting an anti-Semitic cartoon and slurs for informational purposes).

When I viewed an Anti-Defamation League display of Nazi propaganda, I felt a familiar, queasy revulsion — the same feeling I got when I viewed dusty spoils of war, emblazoned with swastikas, at the veterans' halls I visited with my father as a child. What I did not feel was the heart-racing fear engendered by hate propaganda from anonymous senders. Knowing the intent of the Anti-Defamation League made the presentation less intrusive. Knowing that the League is in constant dialogue with victim-group members, carefully considering the possible harms of neutral presentations of hate propaganda, was comforting on the intellectual level.

The growing passion for collecting racist memorabilia is more troublesome.[237] Not all collectors are involved in careful debate, weighing the harm of insult against the value of historic preservation. State intervention might be appropriate where collectors' displays cause gratuitous harm to viewers. The key to differentiating between the Anti-Defamation League display and a hypothetical Gestapo Collector's Club display of lovingly polished storm-trooper paraphernalia is the victim's story. Rather than looking to the neutral, objective, unknowing, and ahistorical reasonable person, we should look to the victim-group members to tell us whether the harm is real harm to real people.

Another area of seemingly less egregious speech is humor.[238] Consider this comment by an American judge: "Do you know how to make a [ethnic group] omelette? Well, first you have to go out and steal three eggs."[239] Not only are these jokes unfunny, they are also cruel and hurtful in much the same way that racist epithets are.[240]

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[237] In visiting an antique shop in Charleston, South Carolina, I noticed old Jim Crow signs for sale as collectors items and wondered who collected the signs, and for what reasons. The demand by collectors for such items is evidenced by ads in antique traders' magazines.

Household items depicting African Americans in servile and degraded positions were common from 1890 to the 1950s. *See* Dubin, *Symbolic Slavery: Black Representations in Popular Culture*, 34 SOC. PROBS. 122 (1987). Dubin catalogs a disgusting array of such items. Some such items include violent imagery intended as humor, such as children eaten by alligators, and golf tees driven into human heads. Dubin argues that popular culture does symbolic violence, implemented when other forms of control, such as slavery, are eliminated. Dubin uses the concept of cultural capital to explain how such items keep certain groups in subordinated positions.

[238] *See* State Div. of Human Rights v. McHarris Gift Center, 52 N.Y.2d 813, 418 N.E.2d 393, 436 N.Y.S.2d 878 (1980), *affg.* 71 A.D.2d 813, 419 N.Y.S.2d 405 (1979) (ruling that display of Polish joke items does not deny equal access to stores to people of Polish descent).

[239] Statement of a judge handling a farm worker's case, reported in *Judge Bradshaw: Bad Humor Man*, FOOD AND JUSTICE, Apr., 1988, at 8 (a publication of the United Farm Workers).

[240] For dissents recognizing the harm of racist jokes, see *McHarris Gift Center*, 52 N.Y.2d at 814, 816, 418 N.E.2d at 393, 394 (Cooke, C.J., and Jansen, J., separately dissenting) (both arguing that Polish gag gifts infringe on free enjoyment of public accommodations). *See also Racist and Sexist Jokes: How Bad Are They (Really)?*, REPORT FROM THE CENTER FOR PHILOSOPHY & PUBLIC POLICY, Spring/Summer 1987, at 9, 11 (discussing the forced resignations of Earl Butz and James Watt for telling racist jokes and noting that "[t]he distinctive wrong of

That they are said with a smile, and in a context that is socially understood as a somewhat more appropriate venue for insult, changes their character somewhat. It is a venue in which private sanction[241] has some opportunity for success. The comedian Richard Pryor, for example, has stated publicly that he has been persuaded to discontinue comedic use of a racial epithet in his performances.[242]

Similarly, in considering the use of racist slurs in the interests of realism in books, films, and theater, the experience of victim-group members is a guide. Writer-Director Spike Lee's recent film *Do the Right Thing*[243] contains a rapid-fire sequence of racial epithets spoken by characters from different racial groups in a Brooklyn neighborhood. The hyper-realism of the sequence offers an incisive anti-racist critique of racist speech. Similarly, Mark Twain, known as a great American writer and anti-racist, used racist dialogue to portray a racist land. The problem for some African-American parents is that their young children may suffer harm from further exposure to racist language, particularly in a white majority setting. There is a danger of some of the students missing entirely, as one commentator noted,[244] the ironic message and simply enjoying a racist dialogue on its face.

The failure of school integration and the under-representation of African Americans in positions of authority in the schools increases the danger that Mark Twain's realism, in some schools, will cause the kind of harm Twain himself would have abhorred. We need safe harbors before we begin rocking boats.

Consider this story:

> *A white teacher in Gould, Arkansas, resigned in tears after parental protests over her statement to boisterous school children that, "I think you're trying to make me think you're a bunch of poor, dumb n——rs, and I don't think that." Seats on the school board and other positions of authority in that town of sixty percent African-American residency, were occupied by African Americans. Students signed petitions urging the school board to reconsider its actions against the teacher, and to give her a second chance. The teacher was reinstated, expressing sincere regret for her error, and her thanks to the students for a second chance. A picture of the smiling white teacher, embracing an African-American student leader,*

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racist and sexist jokes is that the stereotype they evoke and help to maintain are so deeply implicated in our society's long history of injustice to disadvantaged groups").

[241] The attorney for the United Farm Workers who heard the joke, *supra* note 239, responded, "I don't find ethnic jokes humorous. I don't tell them and I don't like to hear them." *Judge Bradshaw: Bad Humor Man, supra* note 239.

[242] Statement of Richard Pryor, in *Live on the Sunset Strip* (Columbia Pictures 1982).

[243] *Do the Right Thing* (Universal Pictures 1989).

[244] Marx, *Huck at 100*, 241 NATION 150 (1985).

accompanies the news item.[245]

Would that all incidents of hate speech have that ending: victims empowered, consciousness raised, community restored, harm kept at bay. Unfortunately for most of us, the conditions necessary for the result achieved in that small Arkansas town are not the conditions we live under. The harm of racist speech slices deeper, the farther away we are from such a life.

H. *The Special Case of Universities*

A marked rise of racial harassment, hate speech, and racially motivated violence marks our entry into the 1990s.[246] The epidemic of racist incidents on university campuses is a disturbing example of this.[247] The application of the first amendment to racist speech, once discussed hypothetically in law schools, is now debated in classrooms where hate messages have actually appeared.[248] The next round of judicial opinions tangling with hate speech and the first amendment may well come from the universities.

University administrators at public institutions are bound by the first amendment under state action doctrine. At private institutions, the principle of free speech is often evoked as a matter of ethics, regardless of whether the Constitution applies directly. The university case raises unique concerns. Universities are special places, charged with pedagogy, and duty-bound to a constituency with special vulnerabilities. Many of the new adults who come to live and study at the major universities are away from home for the first time, and at a vulnerable stage of psychological development.[249] Students are particularly dependent on the university for community, for intellectual development, and for self-definition. Official tolerance of racist speech in this setting is more harmful than generalized tolerance in the community-at-large. It is harmful to student perpetrators in that it is a lesson in getting-away-with-it that will have lifelong repercussions. It is harmful to targets, who perceive the university as taking sides through inaction, and who are left to their own resources in coping with the damage wrought.[250] Finally, it is a harm to the goals of inclusion, education, development of knowledge, and ethics that universities exist and stand for.[251] Lessons of cynicism and hate replace lessons in critical thought and inquiry.

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[245] *Black Students Forgive Teacher's Mistaken Slur,* N.Y. Times, Oct. 17, 1988, at 17, col. 1.

[246] *See, e.g., Anti-Semitic Incidents in 1988 Put at a 5-Year High,* N.Y. Times, Jan. 29, 1989, at 20, col. 1.

[247] See *supra* note 71.

[248] I heard reports of racist slurs appearing on blackboards at the State University of New York at Buffalo. To its credit, the School of Law issued a statement from the faculty warning that sanctions will be imposed for "racist, sexist, homophobic and anti-lesbian, ageist, and ethnically derogatory statements" that indicate the student lacks "sufficient moral character to be admitted to the practice of law." Faculty Statement Regarding Intellectual Freedom, Tolerance, and Prohibited Harassment, State University of New York at Buffalo School of Law, Oct. 3, 1987.

[249] The typical university student is emotionally vulnerable for several reasons. College is a time of emancipation from a pre-existing home or community, of development of identity, of dependence-independence conflict, of major decision making, and formulation of future plans. The move to college often involves geographic relocation — a major life-stress event — and the forging of new peer ties to replace old ones. All of these stresses and changes render the college years critical in development of one's outlook on life. College students experiment with different passions, identities, and risks. A negative environmental response during this period of experimentation could mar for life an individual's ability to remain open, creative, and risk-taking. I

The campus free speech issues of the Vietnam era,[252] and those evoked by the anti-apartheid movement, pit students against university administrators, multinational corporations, the U.S. military, and established governments. In the context of that kind of power imbalance, the free speech rights of students deserve particular deference. Unfortunately, as we know from the memory of four dead in Ohio, that deference is not always forthcoming.

Racist speech on campus occurs in a vastly different power context. Campus racism targets minority students and faculty. Minority students often come to the university at risk academically, socially, and psychologically.[253] Minority faculty are typically untenured, overburdened, isolated, or even nonexistent, as is the case at several

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thank my colleague Dr. Chalsa Loo, a psychologist, college counselor, and specialist in multicultural interaction, for these insights.

[250] *See, e.g.*, Wilkerson, *supra* note 61 (effects of racist speech at University of Michigan, including withdrawal from campus activities, obsession with racism, feelings of conspicuousness in classes, defensiveness, anger, shame, and helplessness).

[251] Some minority students are avoiding white-dominated universities altogether because of apprehension of racist attacks. As a member of the University of Wisconsin Board of Regents testified:

> I now have a 17 year old son and he is getting ready to go off to college. Guess what? In spite of the fact that I am a member of the Board of Regents, he has no interest in attending the UW System. In fact, he has no interest in going anywhere where he will be subjected to harassment because of his color. To date, he has limited his exploration to only traditionally black schools.

Testimony of Erroll B. Davis, Jr., before the Wisconsin Senate Education Committee (Apr. 24, 1989) (unpublished comments on file with author).

[252] *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

[253] Applegate & Henniger, *Recruiting Minority Students: A Priority for the '90s*, THOUGHT & ACTION, Spring 1989, at 53 (minorities underrepresented in professions, declining in college enrollment, and experiencing higher drop-out rates); Crenshaw, *Forward: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NATL. BLACK L.J. 1, 2 (1989) (the norm of "perspectivelessness" in law schools is a particular burden on minority law students); Loo & Rolison, *Alienation of Ethnic Minority Students at a Predominantly White University*, 57 J. HIGHER EDUC. 58 (1986) (ethnic minority university students experience greater feelings of alienation and isolation than white students).

law schools.[254] The marginalized position of minority faculty further marginalizes minority students.

There is legal precedent for considering the status of the target in measuring the amount of freedom verbal attackers enjoy. In the law of defamation, private figures can more easily obtain damages for harm to their reputation than can public figures. This is based on the greater ability of public figures to launch an effective rebuttal and on their voluntary choice to enter the public eye. An additional implicit justification is that wealth, power, and fame provide ego support that helps one weather verbal abuse. If nothing else, the defamed movie star can retreat to Malibu.

The student, like the private figure, has fewer avenues of retreat. Living on or near campus, studying in the library, and interacting with fellow students are integral parts of university life.[255] When racist propaganda appears on campus, target-group students experience debilitated access to the full university experience. This is so even when hate propaganda is directed at groups rather than individuals.[256]

Students are analogous to the captive audience that is afforded special first amendment consideration in other contexts.[257] Similarly, students who support universities through tuition and who are encouraged to think of the university as their home are involuntarily forced into a position of complicity with racism when their campus is offered to hate groups as a forum.[258]

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[254] *See* R. Delgado, *supra* note 218 (reporting on widespread effects of discrimination and high attrition rates among minority law teachers); Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. Pa. L. Rev. 537 (1988); Haines, *Minority Law Professors and the Myth of Sisyphus: Consciousness and Praxis Within the Special Teaching Challenges in American Law Schools*, 10 Natl. Black L.J. 247 (1988); McGee, *Symbol and Substance in the Minority Professoriat's Future*, 3 Harv. BlackLetter J. 67 (1986) (special burdens and obligations of minority law professors).

[255] *See* Board of Trustees, Stanford University, Final Report on Recent Incidents at Ujamaa House (1989) (describing racist incidents in a Stanford residence house and detailing the devastating emotional effect upon students of racist incidents in their residence house). These events are also discussed in Williams, *supra* note 10.

[256] In a compromise between equality of access and first amendment claims, Stanford University proposed to regulate only hate speech directed against individuals or small groups of individuals. *See* Fundamental Standard, *supra* note 191, at 1 (including in the definition of harassment by vilification the requirement that it be "addressed directly to the individual or individuals whom it insults" and that it insults "an individual or a small number of individuals").

Los Angeles hate crime reporting guidelines require a specific target such as an individual, a home, or a place of worship. Generalized hate crimes, such as freeway graffiti, are excluded. Hate Crime in L.A., *supra* note 80, at 5-6.

In my experience, I never hear the next words after a racial slur against my group, Japanese Americans. I don't think a student can hear a racial slur on the way to a lecture, and then concentrate on the lecture as though nothing has happened. The lack of individual targeting does not guarantee a lack of individual harm.

[257] FCC v. Pacifica Found., 438 U.S. 726 (1978) (limiting broadcast of obscene words to a captive audience); *see also* Rowan v. United States Post Office Dept., 397 U.S. 728 (1970) (control over unwanted mail allowed because of sanctity of the home).

A related and literally captive group deserves mention here. The majority of prison inmates in many communities are people of color. Prisons are also fertile grounds for spreading racist hate speech. Courts have protected the rights of hate groups in prisons.[259] The physical vulnerability and inability to escape that characterizes prison life make restriction of hate speech in prisons more important than in the population at large.

SUMMARY: EXPANDED RELEVANCE AND THE HARD CASES

> *[T]erse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed.*[260]
>
> *[I]f we want to be whole, we must recall the past, those parts which we want to remember, those parts which we want to forget.*[261]

The cases discussed above are an effort to construct the conversation we might have if we take on the task of delineating and penalizing the most harmful class of racist speech. It is not an impossible conversation. It is a different one, in that it suggests a highly contextualized analysis and a range of relevant evidence quite at odds with that found in typical legal inquiry.[262] This evidence encompasses the particularity of a victim's time and place as well as the experience of a victim's group over the course of time and space.[263] It recognizes that the experience of racism, of persecution for membership in a group, makes the group's consciousness the victim's consciousness, all of which is relevant in assessing the harm of racist speech.[264] It makes relevant, then, knowledge as old as the Torah and as new as the back page of this morning's newspaper. It makes relevant, too, what has happened to you, to me, to an acquaintance, to a friend of a friend, to a person whom we have never met but who is tied to us as a survivor of the same hate.

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[258] Compare the case of public utilities. The state may not prohibit corporate actors from enclosing controversial messages in utility bill envelopes. Consolidated Edison v. Public Serv. Commn., 447 U.S. 530 (1980).

[259] *See, e.g.*, Note, *Constitutional Analysis in the Prison Context*, 44 ALB. L. REV. 888 (1980) (discussing Curle v. Ward, 46 N.Y.2d 1049, 389 N.E.2d 1070, 416 N.Y.S.2d 549 (1979) (prison guard's right to join KKK upheld over Department of Correction's claim that African-American inmates were terrorized by the Klan)).

[260] Kunz v. New York, 340 U.S. 290, 299 (1951) (Jackson, J., dissenting).

[261] B. Christian, *"Somebody Forgot to Tell Somebody Something": African-American Women's Historical Novels*, Paper delivered at the University of Hawaii 21 (Apr. 1989) (on file with author).

[262] Beauharnais v. Illinois, 343 U.S. 250 (1952), demonstrates the Court's ability to marshal evidence of the level of racial strife in a community, and of the historical connection between racism and violence as it relates to a specific example of hate speech. It cites migration patterns, race riots, bombings, and the history of nativism and racial animosity in Chicago. 343 U.S. at 259-62.

[263] Christine Littleton identifies contextuality in critical legal studies analysis: "[S]eparating the individual from her or his social context in litigation leaves out of a case the very elements that make the case necessary in the first place — unequal social power." Littleton, *supra* note 31, at 760.

[264] Justice Blackmun, in his dissent to the denial of certiorari in the *Skokie* case, suggested the possible continued applicability of *Beauharnais*, and quoted from *Schenck*, "the character of

This deep historical consciousness lifts us out of the neutrality trap, that trap under which many states have passed anti-mask statutes in a barely disguised effort to limit Ku Klux Klan activities.[265] These statutes purportedly cover the wearing of masks in general, with no specific mention of the intent to control the Klan. Neutral reasons, such as the need to prevent pickpockets from moving unidentified through crowds, or the need to demask burglars and bank robbers, are proffered for such statutes.[266] The result of forgetting — or pretending to forget — the real reason for antimask legislation is farcical. Masks are used in protest against terrorist regimes, for reasons of both symbolism and personal safety. Iranian students wearing masks and opposing human rights violations by the Shah of Iran, for example, were prosecuted under a California antimask statute.[267]

This Article calls for an end of such unknowing. We know why state legislatures — those quirkily populist institutions — have passed anti-mask statutes. It is more honest, and less cynically manipulative of legal doctrine, to legislate openly against the worst forms of racist speech, allowing ourselves to know what we know.

VIII. THE UNINTENDED STORY: THE MEANING OF LEGAL PROTECTION OF RACIST HATE MESSAGES

The legal response to racist propaganda provides an interesting context for examination of the relation between law and racism. Legal protection of racism is seen in these doctrinal elements:

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every act depends upon the circumstances in which it is done." Smith v. Collin, 439 U.S. 416, 419 (1978) (Blackmun, J., dissenting) (quoting from Schenck v. United States, 249 U.S. 47, 52 (1919)).

[265] *See* Johnson, *Can the State Unmask the Clan?*, KY. BENCH & BAR, Apr. 1981, at 8 (citing statutes in California, Michigan, Kentucky, North Carolina, Alabama, Florida, South Carolina, Tennessee, Virginia, Oklahoma, and Louisiana. Some statutes contain useful exemptions for Halloween, Mardi Gras, and Gasparilla).

The Village of Skokie's ban against parading in military uniforms was another failed attempt at neutrality. Everyone knew that the feared uniform was the Nazi storm trooper uniform. The courts easily attacked the overbreadth of the "no uniforms" rule. *See* Village of Skokie v. National Socialist Party, 51 Ill. App. 3d 279, 366 N.E.2d 347, 354 (1977), *modified on other grounds*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

[266] Johnson, *supra* note 265 (citing City of Pineville v. Marshall, 222 Ky. 4, 299 S.W. 1072, 1073 (1927) (fear of pickpockets and bandits justified use of police power to ban masks)).

[267] *See* Ghafari v. Municipal Court, 87 Cal. App. 3d 255, 150 Cal. Rptr. 813 (1978) (overturning, on first amendment grounds, convictions for protesting while wearing masks).

(1) the limits of doctrinal imagination in creating first amendment exceptions for racist hate speech;

(2) the refusal to recognize the competing values of liberty and equality at stake in the case of hate speech; and

(3) the refusal to view the protection of racist speech as a form of state action.

The limits of lawmaking imagination of judges, legislators, and other legal insiders who have considered proposals to outlaw hate propaganda is symptomatic of Derrick Bell's interest convergence theory.[268] This limitation of imagination is a disability, a blindness, that prevents lawmakers from seeing that racist speech is a serious threat. Legal insiders cannot imagine a life disabled in a significant way by hate propaganda.

This limited imagination has not affected lawmakers faced with other forms of offensive speech. Laws against dissemination of child pornography and the law of defamation and privacy are examples of areas in which the law recognizes that certain forms of expression are qualitatively different from the kind of speech deserving absolute protection.[269] The legal imagination is able to contemplate what it feels like to hear lies spread about one's professional competency,[270] to have one's likeness used for commercial gain without consent,[271] or to hear unwanted obscenities on the radio.[272] American law has even, at times, provided a tort remedy for white plaintiffs who are "insulted" by "imputation of association with persons of a race to which there is prejudice."[273] When the legal mind understands that reputational interests, which are analogized to the preferred interest in property, must be balanced against first amendment interests, it recognizes the concrete reality of what happens to people who are defamed. Their lives are changed. Their standing in the community, their opportunities, their self-worth, their free enjoyment of life is limited. To see this, and yet to fail to see that the very same things happen to the victims of racist speech, is selective vision.

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[268] D. Bell, Race, Racism, and American Law (2d ed. 1980) (arguing that reform on race issues occurs only when it serves majority interests). As one Atlanta official put it, "If blacks and Jews and other minorities were similarly organized for harassment of and violence to whites, the nation would be turning upside down." Opening Comments of Ms. Jan Douglas, Director, Community Relations Commission, City of Atlanta, at the Open Meeting on Racial and Religious Bigotry and Violence, Atlanta, Ga., Sept. 24, 1981, *quoted in* Hate Group Activity, *supra* note 61, at 1.

[269] *See* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); New York v. Ferber, 458 U.S. 747 (1982). Professor Frederick Schauer argues that the *Ferber* case is an example of the emerging willingness of the Supreme Court to devise different first amendment constructs for different categories of speech. *See* Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 Sup. Ct. Rev. 285; *see also* Sunstein, *supra* note 66 (arguing for a distinction between low value and high value speech).

[270] *See* W. Prosser, Handbook of the Law of Torts 737 (4th ed. 1971) (stating that "there is a great deal of the law of defamation which makes no sense," and going on to describe the action of defamation).

[271] This concept was first imagined by Warren and Brandeis in their article *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

[272] *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).

[273] Annotation, *Libel and Slander: Imputation of Association with Persons of Race or Nationality as to Which There Is Social Prejudice*, 121 A.L.R. 1151, 1151 (1939) (citing Sharp v. Bussey, 137 Fla. 96, 187 So. 779 (1939)).

The selective consideration of one victim's story and not another's results in unequal application of the law. Unlike the victims of defamation and other torts, the victims of racist speech are not representative of the population at large. In making typical legal concessions to the first amendment, we burden a range of victims. In the case of flag-burning, we force patriots, veterans, and flag-lovers of all races to tolerate flag desecration as part of the price of freedom. In contrast, when victims of racist speech are left to assuage their own wounds, we burden a limited class: the traditional victims of discrimination. This class already experiences diminished access to private remedies such as effective counterspeech, and this diminished access is exacerbated by hate messages. Debasing speech discredits targets, further reducing their ability to have their speech taken seriously.[274] The application of absolutist free speech principles to hate speech, then, is a choice to burden one group with a disproportionate share of the costs of speech promotion.[275] The principle of equality is violated by such allocation.[276] The more progressive principle of rectification or reparation[277] — the obligation to repair effects of historical wrongs — is even more grossly violated.

The failure to hear the victim's story results in an inability to give weight to competing values of constitutional dimension.[278] The competing values recognized under international law are equality, liberty, and personality. Each person under that scheme is entitled to basic dignity, to nondiscrimination, and to the freedom to participate fully in society.[279] If there is any central principle to the Bill of Rights, surely that is it. When white supremacist organizations with histories of violence have an active, protected presence in a community, that principle is sacrificed. All our democratic institutions are tainted as a consequence.[280] As Professor Delgado has noted, the underlying first amendment values of self-fulfillment, knowledge, participation, and stable community recognized by first amendment theorists are sacrificed when hate speech is protected.[281] The constitutional commitment to equality and the promise to abolish the badges and incidents of slavery are emptied of meaning[282] when target-group members must alter their behavior, change their choice of neighborhood, leave their jobs, and warn their children off the streets because of hate group activity. When the presence of the Klan deters employers from hiring target-group members, prevents citizens from socializing freely, and keeps parents from sending their children to integrated schools, the

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[274] Professor Catharine MacKinnon argues, similarly, that pornography causes women to be taken less seriously as they enter the public arena. MacKinnon, *Not A Moral Issue*, YALE L. & POLY. REV., Spring 1984, at 321; *see also* Sunstein, *supra* note 66, at 619 (analogizing the case for antipornography legislation to footnote four in United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938), and recognizing "maldistribution of private power").

[275] Tolerance of hate speech thus creates super-regressivity — those least able to pay are the *only* ones taxed for tolerance. Note that it is even more regressive than the typical sales tax, under which an equal percentage is applied to unequal payers. Under that system no one group is exclusively taxed. *See also* Marcuse, *Repressive Tolerance*, in A CRITIQUE OF PURE TOLERANCE 81 (1969); *Cf.* Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1988) (history and normative evaluation of regressive and progressive schemes of taxation in the United States).

[276] This contextualized understanding of equality is admittedly at odds with the conservative view of equality as equal treatment without regard to individual disadvantage. *See, e.g.*, Washburn, *Liberalism versus Free Speech*, NATL. REV., Sept. 30, 1988, at 39 (comparing an African-American professor's complaints of harassment unfavorably to historical examples of toleration of insults generated by whites against whites).

[277] *See* Matsuda, *supra* note 20.

[278] As Detroit City Councilperson Mel Ravitz said in explanation of his support for a denial of a park-use permit to the SS Action Group:

> In addition to honoring the rights guaranteed under the First Amendment, it is also the City Council's obligation to honor the rights guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments of the same Constitution. Those Amendments are the constitutional basis for "equality," which is as much a fundamental constitutional right as freedom of speech.

National Alliance Against Racist & Political Repression, *Now Is the Time: Outlaw the KKK, Nazis, and Other Hate Groups*, ORGANIZER, June/July 1986, at 2, 7.

[279] Fanny Drake Crumsey of Chattanooga, Tennessee, the victim of a random Klan shooting spree on April 19, 1980, expressed the claim to personhood succinctly:

> I think that I have the right and the privilege to sit on my porch, plant flowers in my yard, and visit my neighbors freely, without any physical or mental abuse. That includes not being shot at, shot, or any other form of danger to me, a peaceful law-abiding citizen of this and any other community.

SOUTHERN ORGANIZING COMMITTEE & SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, CHALLENGE TO AMERICA: VICTIMS OF RACIST VIOLENCE TELL THEIR STORIES 3 (1981).

For a classic discussion of the denial of personhood engendered by a racist environment, see W.E.B. DUBOIS, *supra* note 25.

[280] The jury system, for example, is suspect when racist speech enters jury deliberations. *See* Note, *Racist Slurs by Jurors as Ground for Impeaching a Jury's Verdict:* State v. Shillcut, 1985 WIS. L. REV. 1481 (In State v. Shillcut, 119 Wis. 2d 788, 350 N.W.2d 686 (1984) the court denied a new trial in spite of a juror's comment to the effect that the defendant was African-American and therefore probably guilty.).

[281] Delgado, *supra* note 6; *see also supra* text accompanying note 54. *Self-fulfillment* is sacrificed when racial insults are internalized by victims and perpetrators — both groups are denied the ability to choose to live in harmony.

[282] *See* Jones, *supra* note 22, at 433-34; Professor Charles Lawrence has argued that *Brown v. Board of Education* was really about racist speech. Segregation was wrong, the Court found, because of the message of inferiority communicated by segregation. The Court in *Brown* limited the expression of an idea. *See* Beyers, *Lawyers Debate 1st Amendment Limits, Interpretation of Fundamental Standard*, Stanford University Campus Report, Apr. 12, 1989, at 1, col. 1, at 6, col. 1 (quoting Charles Lawrence); *see also* Lawrence, *"One More River to Cross" — Recognizing the Real Injury in* Brown: *A Prerequisite to Shaping New Remedies*, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 48 (D. Bell ed. 1980).

goal of nondiscrimination is moved farther away from present realities. When hate propaganda spreads attitudes of racism and desensitizes potential abusers to the wrongness of violence, other more obvious goals of safety and order are sacrificed.

The third doctrinal pillar supporting racist speech is the refusal to recognize that tolerance and protection of hate group activities by the government is a form of state action. To allow an organization known for violence, persecution, race hatred, and commitment to racial supremacy to exist openly, and to provide police protection and access to public streets and college campuses for such a group, means that the state is promoting racist speech. If not for such support, hate groups would decline in efficacy. The chilling sight of avowed racists in threatening regalia marching through our neighborhoods with full police protection is a statement of state authorization.[283] The Klan marches because marching promotes the Klan, and because of the terrorizing and inciting effect of its public displays. Open display conveys legitimacy. The government advances this effect when it protects these marches. In addition, the failure to provide a legal response limiting hate propaganda elevates liberty interests of racists over liberty interests of targets. A member of the Georgia Bureau of Investigation, for example, once suggested to whites targeted for hate speech because of their association with African Americans that they should avoid being seen in cars with African Americans, and cease inviting African Americans to their homes.[284]

The effect of racist propaganda is to devalue the individual and to treat masses of people in a degraded way with no measure of individual merit. This is precisely what civil libertarians oppose when the state acts.[285] Because racist speech is seen as private, the connection to loss of liberty is not made. State silence, however, is public action where the strength of the new racist groups derives from their offering legitimation and justification for otherwise socially unacceptable emotions of hate, fear, and aggression.[286] The need for a formal group, for a patriotic cause, and for an elevation of the doubting self are part of the traditional attraction of groups like the Klan. Government protection of the right of the Klan to exist publicly and to spread a racist message promotes the role of the Klan as a legitimizer of racism.[287]

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[283] In fact, the historical connection between hate groups and the state is more than passive; law enforcement officers have been active as well as passive participants in groups like the KKK. *See* P. SIMS, *supra* note 1, at 245-48 (deputy sherriff convicted in killing of three civil rights workers in Mississippi).

[284] HATE GROUP ACTIVITY, *supra* note 61, at 21.

[285] *See, e.g.*, Jacobs & Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. DAVIS L. REV. 595 (1985). The Klan has also raised objections to generalized searches. *See* Wilkinson v. Forst, 591 F. Supp. 403 (D. Conn. 1984) (KKK challenges generalized weapons search of attendees at KKK rallies).

[286] *See* H. KITANO, *supra* note 68, at 113 (discussion of displaced aggression and racial discrimination). *See generally* D. BENNETT, THE PARTY OF FEAR: FROM NATIVIST MOVE-

Further, the law's failure to provide recourse to persons who are demeaned by the hate messages is an effective second injury to that person.[288] The second injury is the pain of knowing that the government provides no remedy, and offers no recognition of the dehumanizing experience that victims of hate propaganda are subjected to.[289] The government's denial of personhood by denying legal recourse may be even more painful than the initial act of hatred. One can dismiss the hate group as an organization of marginal people, but the state is the official embodiment of the society we live in.

The legal realists and their progeny recognize that law formation is largely a matter of value.[290] There are no inevitable results; there is no controlling logic or doctrine that can make the hard choices for us. Reversion to discredited doctrinal absolutism carries a strong implication that racist activities are supported, albeit unintentionally, by the law. In a society that expresses its moral judgments through the law, and in which the rule of law and the use of law are characteristic responses to many social phenomena, this absence of laws against racist speech is telling.

We can defy the proposition that racism is part of law by opening our eyes to the reality of racism and making the decision to outlaw hate groups. We can draw from the international standard and acknowledge the competing interests at stake, adapting existing law and creating new law to limit hate group activities. It is not necessary to abandon first amendment values in order to do this. The analytical

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MENTS TO THE NEW RIGHT IN AMERICAN HISTORY (1988) (historical fear of sinister enemies as impetus for racist movements).

[287] Racist organizations are also eligible for attorneys' fees when they challenge government limitations of racist speech. Targets are thus further taxed for exercise of Klan speech. *See, e.g.*, Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd., 735 F.2d 895 (5th Cir. 1984) (upholding award of attorneys' fees where KKK challenged the board's denial of school facilities to racist groups).

[288] *Cf.* R. NADER, UNSAFE AT ANY SPEED 81-146 (1965) (discussing the second injury caused when accident victims strike the interior of their own cars). As Professor David Kretzmer has argued, "a society committed to ideals of social and political equality cannot remain passive: it must issue unequivocal expressions of solidarity with vulnerable minority groups and make positive statements affirming its commitments to those ideals." Kretzmer, *supra* note 36, at 456.

[289] *See* Delgado, *supra* note 6.

[290] Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931) ("The conception of law as a means to social ends and not an end in itself").

dexterity of legal thinkers offers many options for reconciling the American position with the international goal of elimination of all forms of racial discrimination.

Professor Massaro in her contribution to this symposium challenges us to choose among stories, among values. This Article suggests that the stories of those who have experienced racism are of special value in defeating racism. It further suggests that we can, and have, chosen as a primary value freedom from racial oppression. Finally, in doing the awkward work of constructing doctrine, this Article suggests a belief in the possibility and the necessity of creating a legal response to racist speech that transcends first amendment absolutism. We can attack racist speech — not because it isn't really speech, not because it falls within a hoped-for neutral exception, but because it is wrong.

There is, in every constitutional doctrine we devise, the danger of misuse. For fear of falling, we are warned against taking a first step. Frozen at the first amendment bulkhead we watch the rising tide of racial hatred wash over our schools and work places. Students victimized by racist speech turn to university administrations for redress, and are told that the first amendment forecloses institutional action. We owe those students a more thoughtful analysis than absolutism. At the least, before we abandon the task of devising a legal response to racist speech, we should consider concretely the options available to us. The legal imagination is a fruitful one. That is the one hopeful message of the postmodern critique of law. Nothing inherent in law ties our hands, and lawyers, through the ages, have displayed abundant skills of invention.

CONCLUSION

The emerging jurisprudence of outsiders uses the experience of subordination to offer a phenomenology of race and law. The victims' experience reminds us that the harm of racist hate messages is a real harm, to real people. When the legal system offers no redress for that real harm, it perpetuates racism.

This Article attempts to begin a conversation about the first amendment that acknowledges both the civil libertarian's fear of tyranny and the victims' experience of loss of liberty in a society that tolerates racist speech. It suggests criminalization of a narrow, explicitly defined class of racist hate speech, to provide public redress for the most serious harm, while leaving many forms of racist speech to private remedies. Some may feel this proposal does not go far enough, leaving much hurtful speech to the uneven control of the marketplace of ideas. Others will cringe at what they perceive as a call for censorship. This is not an easy legal or moral puzzle, but it is precisely in these places where we feel conflicting tugs at heart and mind that we have the most work to do and the most knowledge to gain.

We are a legalized culture. If law is where racism is, then law is where we must confront it. The doctrinal reconstruction presented here is tentative and subject to change as our struggle around this issue continues. However we choose to respond to racist speech, let us present a competing ideology, one that has existed in tension with racism since the birth of our nation: there is inherent worth in each human being, and each is entitled to a life of dignity.

GOOD SPEECH BAD SPEECH

SHOULD UNIVERSITIES
RESTRICT EXPRESSION
THAT IS RACIST
OR OTHERWISE
DENIGRATING?

TWO VIEWS....

ONE PERSON'S FREEDOM *of expression may be another's verbal assault—a dilemma with First Amendment implications. Constitutional law experts Charles Lawrence and Gerald Gunther explore this in the following essays. Note that while the two professors take differing stands, both speak from experience as victims of the kind of "bad speech" at issue.*

Their arguments were initially framed in the context of an ongoing debate at Stanford University over whether and how the Fundamental Standard for student conduct should be amended. Several other Law School faculty members—including Dean Brest and Professors William Cohen, Thomas Grey, and Robert Rabin—have also contributed to the campus deliberations.

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YES

by Charles Lawrence
Professor of Law

I HAVE SPENT the better part of my life as a dissenter. As a high-school student, I was threatened with suspension for my refusal to participate in a civil-defense drill, and I have been a conspicuous consumer of my First Amendment liberties ever since. There are very strong reasons for protecting even speech that is racist. Perhaps the most important is that such protection reinforces our society's commitment to tolerance as a value. By protecting bad speech from government regulation, we will be forced to combat it as a community.

I have, however, a deeply felt apprehension about the resurgence of racial violence and the corresponding increase in the incidence of verbal and symbolic assault and harassment to which blacks and other traditionally excluded groups are subjected. I am troubled by the way the debate has been framed in response to the recent surge of racist incidents on college and university campuses and in response to some universities' attempts to regulate harassing speech. The problem has been framed as one in which the liberty of free speech is in conflict with the elimination of racism. I believe this has placed the bigot on the moral high ground and fanned the rising flames of racism.

Above all, I am troubled that we have not listened to the real victims—that we have shown so little understanding of their injury, and that we have abandoned those whose race, gender, or sexual orientation continues to make them second-class citizens. It seems to me a very sad irony that the first instinct of civil libertarians has been to challenge even the smallest, most narrowly framed efforts by universities to provide black and other minority students with the protection the Constitution, in my opinion, guarantees them.

The landmark case of *Brown v. Board of Education* is not a case that we normally think of as a case about speech. But *Brown* can be broadly read as articulating the principle of equal citizenship. *Brown* held that segregated schools were inherently unequal because of the message that segregation conveyed: that black children were an untouchable caste, unfit to go to school with white children. If we understand the necessity of eliminating the system of signs and symbols that signal the inferiority of blacks, then we should hesitate before proclaiming that all racist speech that stops short of physical violence must be defended.

University officials who have formulated policies to respond to incidents of racial harassment have been characterized in the press as "thought police," even though such policies generally do nothing more than impose sanctions against intentional face-to-face insults. Racist speech that takes the form of face-to-face insults, catcalls, or other assaultive speech aimed at an individual or small group of persons falls directly within the "fighting words" exception

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Professor Lawrence, *who has been at Stanford since 1983, teaches constitutional law, education and law, and race relations. Known for his penetrating analyses of unconscious racism, he is the author (with Joel Dreyfuss) of* The Bakke Case: The Politics of Inequality *(1979) and numerous scholarly articles.*

YES

to First Amendment protection. The Supreme Court has held in *Chaplinsky v. New Hampshire* that words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected by the First Amendment.

If the purpose of the First Amendment is to foster the greatest amount of speech, racial insults disserve that purpose. Assaultive racist speech functions as a preemptive strike. The invective is experienced as a blow, not as a proffered idea. And once the blow is struck, a dialogue is unlikely to follow. Racial insults are particularly undeserving of First Amendment protection, because the perpetrator's intention is not to discover truth or initiate dialogue but to injure the victim. In most situations, members of minority groups realize that they are likely to lose if they fight back, and are forced to remain silent and submissive.

Courts have held that offensive speech may not be regulated in public forums (such as streets, where the listener may avoid the speech by moving on). But the regulation of otherwise protected speech has been permitted when the speech invades the privacy of the unwilling listener's home, or when the unwilling listener cannot avoid the speech. Racist posters, fliers, and graffiti in dormitories, bathrooms, and other common living spaces would seem to fall within the reasoning of these cases. Minority students should not be required to remain in their rooms in order to avoid racial insult. Minimally, they should find a safe haven in their dorms and in all other common rooms that are a part of their daily routine.

I would also argue that the university's responsibility for ensuring that these students receive an equal educational opportunity provides a compelling justification for regulations that ensure them safe passage in all common areas. A minority student should not have to risk becoming the target of racially assaulting speech every time he or she chooses to walk across campus. Regulating vilifying speech that cannot be anticipated or avoided need not preclude announced speeches and rallies—situations that would give minority-group members and their allies the opportunity to organize counterdemonstrations or avoid the speech altogether.

THE MOST commonly advanced argument against the regulation of racist speech proceeds something like this: We recognize that minority groups suffer pain and injury as the result of racist speech, but we must allow this hate mongering for the benefit of society as a whole. Freedom of speech is the lifeblood of our democratic system. It is especially important for minorities, because often it is their only vehicle for rallying support for the redress of their grievances. It will be impossible to formulate a prohibition so precise that it will prevent the racist speech you want to

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Racist speech that takes the form of face-to-face insults or other assaultive speech falls directly within the 'fighting words' exception to First Amendment protection.

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suppress, without catching in the same net all kinds of speech that it would be unconscionable for a democratic society to suppress.

Such arguments seek to strike a balance between our concern, on the one hand, for the continued free flow of ideas and the democratic process dependent on that flow, and, on the other, our desire to further the cause of equality. There can, however, be no meaningful discussion of how we should reconcile our commitment to equality with our commitment to free speech, until it is acknowledged that racist speech inflicts real harm, and that this harm is far from trivial.

To engage in a debate about the First Amendment and racist speech without a full understanding of the nature and extent of that harm is to risk making the First Amendment an instrument of domination rather than a vehicle of liberation. We have not all known the experience of victimization by racist, misogynist, and homophobic speech, nor do we equally share the burden of the harm it inflicts. We are often quick to say that we have heard the cry of the victims when we have not.

The *Brown* case is again instructive, because it speaks directly to the psychic injury inflicted by racist speech by noting that the symbolic message of segregation affected "the hearts and minds" of Negro children "in a way unlikely ever to be undone." Racial epithets and harassment often cause deep emotional scarring and feelings of anxiety and fear that pervade every aspect of a victim's life.

Brown also recognized that black children did not have an equal opportunity to learn and participate in the school community when they bore the additional burden of being subjected to the humiliation and psychic assault contained in the message of segregation. University students bear an analogous burden when they are forced to live and work in an environment where at any moment they may be subjected to denigrating verbal harassment and assault. The same injury was addressed by the Supreme Court when it held that, under Title VII of the Civil Rights Act of 1964, sexual harassment which creates a hostile or abusive work environment violates the ban on sex discrimination in employment.

Carefully drafted university regulations could bar the use of words as assault weapons while at the same time leaving unregulated even the most heinous of ideas provided those ideas are presented at times and places and in manners that provide an opportunity for reasoned rebuttal or escape from immediate insult. The history of the development of the right to free speech has been one of carefully evaluating the importance of free expression and its effects on other important societal interests. We have drawn the line between protected and unprotected speech before without dire results. (Courts have, for example, exempted from the protection of the First Amendment obscene speech and speech that disseminates official secrets, defames or libels another person, or is used to form a conspiracy or monopoly.)

Blacks and other people of color are skeptical about the argument that even the most injurious speech must remain unregulated because, in an unregulated marketplace of ideas, the best ones will rise to the top and gain acceptance. Experience tells quite the opposite. People of color have seen too many demagogues elected by appealing to America's racism, and too many sympathetic politicians shy away from issues that might brand them as being too closely allied with disparaged groups.

Whenever we decide that racist speech must be tolerated because of the importance of maintaining societal tolerance for all unpopular speech, we are asking blacks and other subordinated groups to bear the burden for the good of all. We must be careful that the ease with which we strike the balance against the regulation of racist speech is in no way influenced by the fact that the cost will be borne by others. We must be certain that those who will pay that price are fairly represented in our deliberations and that they are heard.

At the core of the argument that we should resist all government regulation of speech is the ideal that the best cure for bad speech is good—that ideas that affirm equality and the worth of all individuals will ultimately prevail. This is an empty ideal unless those of us who would fight racism are vigilant and unequivocal in that fight. We must look for ways to offer assistance and support to students whose speech and political participation are chilled in a climate of racial harassment.

Civil rights lawyers might consider suing on behalf of blacks whose right to an equal education is denied by a university's failure to ensure a nondiscriminatory educational climate or conditions of employment. We must embark upon the development of a First Amendment jurisprudence grounded in the reality of our history and our contemporary experience. We must think hard about how best to launch legal attacks against the most indefensible forms of hate speech. Good lawyers can create exceptions and narrow interpretations that limit the harm of hate speech without opening the floodgates of censorship.

Everyone concerned with these issues must find ways to engage actively in actions that resist and counter the racist ideas that we would have the First Amendment protect. If we fail in this, the victims of hate speech must rightly assume that we are on the bigots' side.

—Reprinted (with minor changes) from the Chronicle of Higher Education, *October 25, 1989, where it appeared as an Opinion piece, "The Debate over Placing Limits on Racist Speech Must Not Ignore the Damage It Does to Its Victims." A more extended discussion of Lawrence's views is scheduled for publication in the* Duke Law Review.

NO

by Gerald Gunther
William Nelson Cromwell
Professor of Law

Professor Gunther, one of the nation's foremost constitutional law scholars, has taught courses on freedom of speech at Columbia, Harvard, and for the past 28 years, at Stanford. Some 600 pages of his landmark casebook, Constitutional Law *(11th ed., 1985) are devoted to First Amendment issues.*

I AM deeply troubled by current efforts—however well-intentioned—to place new limits on freedom of expression at this and other campuses. Such limits are not only incompatible with the mission and meaning of a university; they also send exactly the wrong message from academia to society as a whole. University campuses should exhibit greater, not less, freedom of expression than prevails in society at large.

Proponents of new limits argue that historic First Amendment rights must be balanced against "Stanford's commitment to the diversity of ideas and persons." Clearly, there is ample room and need for vigorous University action to combat racial and other discrimination. But curbing freedom of speech is the wrong way to do so. The proper answer to bad speech is usually more and better speech—not new laws, litigation, and repression.

Lest it be thought that I am insensitive to the pain imposed by expressions of racial or religious hatred, let me say that I have suffered that pain and empathize with others under similar verbal assault. My deep belief in the principles of the First Amendment arises in part from my own experiences.

I received my elementary education in a public school in a very small town in Nazi Germany. There I was subjected to vehement anti-Semitic remarks from my teacher, classmates and others—"Judensau" (Jew pig) was far from the harshest. I can assure you that they hurt. More generally, I lived in a country where ideological orthodoxy reigned and where the opportunity for dissent was severely limited.

The lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigots' hateful ideas with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law.

Obviously, given my own experience, I do *not* quarrel with the claim that words *can* do harm. But I firmly deny that a showing of harm suffices to deny First Amendment protection, and I insist on the elementary First Amendment principle that our Constitution usually protects even offensive, harmful expression.

That is why—at the risk of being thought callous or doctrinaire—I feel compelled to speak out against the attempt by some members of the Stanford community to enlarge the area of forbidden speech under the Fundamental Standard. Such proposals, in my view, seriously undervalue the First Amendment and far too readily endanger its precious content. Limitations on free expression beyond those established by law should be eschewed in an institution committed to diversity and the First Amendment.[1]

In explaining my position, I will avoid extensive legal arguments. Instead, I

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NO

want to speak from the heart, on the basis of my own background and of my understanding of First Amendment principles—principles supported by an ever larger number of scholars and Supreme Court justices, especially since the days of the Warren Court.

Among the core principles is that any official effort to suppress expression must be viewed with the greatest skepticism and suspicion. Only in very narrow, urgent circumstances should government or similar institutions be permitted to inhibit speech. True, there are certain categories of speech that may be prohibited; but the number and scope of these categories has steadily shrunk over the last fifty years. Face-to-face insults are one such category; incitement to immediate illegal action is another. But opinions expressed in debates and arguments about a wide range of political and social issues should not be suppressed simply because of disagreement with those views, with the content of the expression.

Similarly, speech should not and cannot be banned simply because it is "offensive" to substantial parts or a majority of a community. The refusal to suppress offensive speech is one of the most difficult obligations the free speech principle imposes upon all of us; yet it is also one of the First Amendment's greatest glories—indeed it is a central test of a community's commitment to free speech.

The Supreme Court's 1989 decision to allow flag-burning as a form of political protest, in *Texas v. Johnson*, warrants careful pondering by all those who continue to advocate campus restraints on "racist speech." As Justice Brennan's majority opinion in *Johnson* reminded, "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." In refusing to place flag-burning outside the First Amendment, moreover, the *Johnson* majority insisted (in words especially apt for the "racist speech" debate): "The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—*such as the principle that discrimination on the basis of race is odious and destructive*—will go unquestioned in the marketplace of ideas. We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment." (Italics added.)

There is ample room and need for vigorous University action to combat racial and other discrimination. But curbing freedom of speech is the wrong way to do so.

CAMPUS PROPONENTS of restricting offensive speech are currently relying for justification on the Supreme Court's allegedly repeated reiteration that "fighting words" constitute an exception to the First Amendment. Such an exception has indeed been recognized in a number of lower court cases. However, there has only been *one* case in the history of the Supreme Court in which a majority of the Justices has ever found a

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statement to be a punishable resort to "fighting words." That was *Chaplinsky v. New Hampshire*, a nearly fifty-year-old case involving words which would very likely not be found punishable today.

More significant is what has happened in the nearly half-century since: Despite repeated appeals to the Supreme Court to recognize the applicability of the "fighting words" exception by affirming challenged convictions, the Court has in every instance refused. One must wonder about the strength of an exception that, while theoretically recognized, has for so long not been found apt in practice. (Moreover, the proposed Stanford rules are *not* limited to face-to-face insults to an addressee, and thus go well beyond the traditional, albeit fragile, "fighting words" exception.)

The phenomenon of racist and other offensive speech that Stanford now faces is not a new one in the history of the First Amendment. In recent decades, for example, well-meaning but in my view misguided majorities have sought to suppress not only racist speech but also antiwar and antidraft speech, civil rights demonstrators, the Nazis and the Ku Klux Klan, and left-wing groups.

Typically, it is people on the extremes of the political spectrum (including those who advocate overthrow of our constitutional system and those who would not protect their opponents' right to dissent were they the majority) who feel the brunt of repression and have found protection in the First Amendment; typically, it is well-meaning people in the majority who believe that their "community standards," their sensibilities, their sense of outrage, justify restraints.

Those in power in a community recurrently seek to repress speech they find abhorrent; and their efforts are understandable human impulses. Yet freedom of expression—and especially the protection of dissident speech, the most important function of the First Amendment—is an anti-majoritarian principle. Is it too much to hope that, especially on a university campus, a majority can be persuaded of the value of freedom of expression and of the resultant need to curb our impulses to repress dissident views?

THE PRINCIPLES to which I appeal are not new. They have been expressed, for example, by the most distinguished Supreme Court justices ever since the beginning of the Court's confrontations with First Amendment issues nearly seventy years ago. These principles are reflected in the words of so imperfect a First Amendment defender as Justice Oliver Wendell Holmes: "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

This is the principle most elaborately and eloquently addressed by Justice Louis D. Brandeis, who reminded us that the First Amendment rests on a belief "in the power of reason as applied through public discussion" and therefore bars "silence coerced by law—the argument of force in its worst form."

This theme, first articulated in dissents, has repeatedly been voiced in majority opinions in more recent decades. It underlies Justice Douglas's remark in striking down a conviction under a law banning speech that "stirs the public to anger": "A function of free speech [is] to invite dispute.... Speech is often provocative and challenging. That is why freedom of speech [is ordinarily] protected against censorship or punishment."

It also underlies Justice William J. Brennan's comment about our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks"—a comment he followed with a reminder that constitutional protection "does not turn upon the truth, popularity or social utility of the ideas and beliefs which are offered."

These principles underlie as well the repeated insistence by Justice John Marshall Harlan, again in majority opinions, that the mere "inutility or immorality" of a message cannot justify its repression, and that the state may not punish because of "the underlying content of the message." Moreover, Justice Harlan, in one of the finest First Amendment opinions on the books, noted, in words that Stanford would ignore at its peril at this time:

"The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours.... To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength."

In this same passage, Justice Harlan warned that a power to ban speech merely because it is offensive is an "inherently boundless" notion, and added that "we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." (The Justice made these comments while overturning the conviction of an antiwar protestor for "offensive conduct." The defendant had worn, in a courthouse corridor, a jacket bearing the words "Fuck the Draft." It bears noting, in light of the ongoing campus debate, that Justice Harlan's majority opinion also warned that "we cannot indulge in the facile assumption that one can forbid particular words without also running the substantial risk of suppressing ideas in the process.")

I restate these principles and repeat these words for reasons going far beyond the fact that they are familiar to me as a First Amendment scholar. I believe—in my heart as well as my mind—that these principles and ideals are not only established but right. I hope that the entire Stanford community will seriously reflect upon the risks to free expression, lest we weaken hard-won liberties at Stanford and, by example, in this nation.

—Adapted from two letters to the chair of the Student Conduct Legislative Council, dated March 10 and May 1, 1989, and published in Stanford University Campus Report *on March 15 and May 3, respectively.*

Footnote

1. These comments were directed at a proposal (later withdrawn in the face of criticism) to prohibit not only "personal abuse" but also "defamation of groups"—expression "that by accepted community standards...pejoratively characterizes persons or groups on the basis of personal or cultural differences."—G.G.

Looking Ahead to the 1990's: Constitutional Law and American Colleges and Universities

Martha Minow[1]

Key-Note Address to the National Association of Colleges and Universities Attorneys Meeting

June 28, 1989

I have been asked to speak to you on the topic, "Looking Ahead to the 1990's". Knowing what we all know about long-range planning, I'm afraid it's too late to look ahead to the 1990's; they are upon us! And we haven't even named the 1980's! I have heard the suggestion that if the 1970's were the "me" generation, the 1980's were the "mean" generation.

While we ponder a label for the outgoing decade, perhaps we can pick a name for the 90's and then try to make a history to fit. How about this name for the 1990's: "the decade of distinction." Nice sounding, and ambiguous, right? But here's in particular why I propose it to you, who provide legal counsel to our nation's great institutions of higher learning. You of course know that the term, "distinction," means worthiness, having special honor or recognition. But distinction also means what follows when we distinguish a difference; it means discrimination. Now, discrimination has acquired the unfortunate

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[1] Professor of Law, Harvard University.

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association of illicit or pernicious distinctions, drawn on the basis of race, sex, or other traits of group membership. We know the legacies of our legal and social history: disparate and degrading treatment accorded to some people based on the assessment that they were "different." Skin color, sex, religion, physical and mental disabilities, age, sexual orientation: the list of differences that have mattered is the list of historic bases for oppression. Traits of distinction have been used to deny people entrance to your institutions, and at times to deny them any rights.

Lawyers and reformers have challenged these historic patterns with noted successes. It was not by accident that the NAACP Legal Defense Fund targeted first universities and colleges and then public schools to challenge the practices of racial segregation. Schools are central to the tasks of democracy as well as the vehicles for success in America, and for these reasons, educational institutions will continue to be settings for debating the meanings of neutrality, equality, and tolerance and for struggling to enact those ideals.

If the 1990's are to be a decade of distinction, I think this could mean a time to rethink distinctions that have wrongly been made to matter -- and to consider distinctions that we should make matter. But I am getting a bit ahead of myself. Let me start at the beginning. We're lucky to be lawyers, because we are experts in drawing distinctions. The basic problem solving mode in law, after all, is distinguishing cases. As I tell my first year law students, Sesame Street provides the essential introduction to law in its episode, "Which One of These Things Is Not Like the Other?" The episode engages the viewer in a process of categorization: a chair, a table, a book, and a bed -- which one of these is not like the others? Drawing analogies across like cases and distinguishing unlike cases this is the critical tool for analyzing precedents, interpreting statutes, persuading decision-makers to accept your view.[2]

I worry, thought, that we tend to draw distinctions when we shouldn't -- on the basis of race, gender, and other fixed personal traits -- and we fail to draw distinctions when we should -- distinguishing, say, speech from harassment. Line-drawing itself is not the point. Reaching desired ends is. Drawing lines is a technique to fulfill social purposes rather than a discovery of "real differences" or "real similarities" in the world. We make distinctions; we don't just find them. I ask today, in the name of the distinctive 90's, how can our line-drawing methods serve rather than obscure the constitutional ideals of equality, neutrality, and tolerance? My take-home message is that serving our ideals will involve learning to understand difference by recognizing diverse points of view. This recognition won't tell us what to do; it may even make things seem more complicated. But until we recognize the contrasting points of view on the meanings of constitutional norms, we won't know what distinctions matter, to whom.

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[2] But line-drawing as the problem-solving mode of choice may lead us to contribute to patterns of exclusion; we claim to base our judgments about how people should be treated based on what we call alike and unlike. Here, I mean to refer to legacies of illicit discrimination on the basis of race, sex, religion, disability, and sexual orientation, all of which I will discuss here. At the same time, perhaps paradoxically, we are often so afraid of the difficulties in line-drawing that we reach a certain judgment in order to avoid drawing distinctions -- in order to avoid facing future instances in the future when we'll have to draw a new line. Here, I mean to refer to absolutist positions that fear "slippery slopes" -- notably, the contemporary absolutist First Amendment argument against responses to racist or other forms of hate speech cropping up on the campuses around the country. This topic -- hate speech -- I will also discuss, by looking at the process of reasoning through distinctions.

This all may seem abstract, academic, or mushy. Let me get hard-headed, and offer into evidence, three exhibits, to explore the three goals: equality, neutrality, and tolerance.

Well, actually, three cartoons. These are the kind that professors clip out and tape on our office doors, chiefly because we've run out of space on the refrigerator at home.

The first cartoon shows a spotted dog, sitting at a typewriter, who types out: "The quick brown dog jumped over the lazy fox."

The second shows a judge with a bulbous nose and bushy mustache, looking down from the bench at a defendant with the same nose and mustache. The judge announces, "Obviously, not guilty!"

In the third cartoon, a first frame shows a Minister opening his mail and reading a letter that says, "Dear Minister, I'm sick and tired of your holier than thou attitude," and it is signed, "Fed Up." The Minister thinks for a minute, and then writes back, "Dear Fed Up: I forgive you." In the final frame, the minister thinks to himself, "Shame on you!"

What is going on in these cartoons? Now, the best way to kill a joke is to analyze it, but that's what we do in law school. So here goes.

Consider the first cartoon, the cartoon of the dog at the typewriter who types out, "The quick brown dog jumped over the lazy fox." This cartoon helps to highlight problems we have in fulfilling commitments to equality. It shows how prejudices and stereotypes work. They are shorthand to communicate that "we" are better than "they." This is a rather obvious, but not especially funny, point.

What's funny here is that the dog is a member of the group usually situated as the lazy one in the saying, "The quick brown fox jumped over the lazy dog." The cartoon thus uses the familiar humor device of surprise or substitution. Working at a level of deeper significance, the cartoon shows the impact of perspective on perceptions of equality and inequality. The cartoon reminds us that even commonplace perceptions of others, captured in sayings that we assume everyone knows and endorses, fall short of universality. They adopt a viewpoint.

We are usually able to remain unaware of our own viewpoint AS a viewpoint because it is reinforced by those we know, those like us, those we look to, to confirm our perceptions -- those who tend to be like ourselves. The cartoon reminds us that when we get a glimpse of the world from the vantage point of someone WE think differs from ourselves, WE may be the odd or different one. Indeed, we are as different from they as they are from us. Difference is not something intrinsic in the "different" person. It is a comparison.

I have been told in Sweden and Norway, people tend to tell a lot of the same jokes -- but in Norway they are about Swedes, and in Sweden they are about Norwegians. We may attribute to a group we don't know all the traits we don't like even as they may do the same to us.

The goal of equality, then, will remain elusive so long as we attribute differences to others and then pretend that differences are discovered, not socially created. Equality will remain elusive so long as we neglect perspectives other than our own that could challenge the labels, like lazy, we assign.

Consider this in the context of legal equality. Courts have interpreted constitutional and statutory equality provisions to insist that the government, employers, and schools treat people must be treated the same, that is, if they ARE the same. But if they are not the same, if they are "really different," then the demands of equal treatment do not apply. It is unfair to treat people differently if they really are the same; but it is also unfair to treat people the same if they are different.

This points to the complexities of equality. The Supreme Court recognized the complexities by ruling in 1974 in the case of Lau v. Nichols. The Court ruled that instructing all public school children in English does not accord the SAME treatment to students who primarily speak Chinese as it does to those who speak primarily English. The Chinese-speaking students are denied the same opportunity to learn in the classroom granted to English-speaking students unless the language differences are acknowledged in the curriculum.

Accommodation means remaking the basic ground-rules so the difference is not used to exclude. Imagine a student who uses a wheel-chair. What is her experience as a college student? Those of you who have worked on issues of accommodation for disabled students have thought hard about this. Following a student in a wheel-chair around campus is a sobering experience, even when there has been accommodation. Maneuvering a ramp in the snow, managing doorways and tight corners are hard enough. How about the student who joins an organization -- say, even someone elected to the Law Review -- but who remains foreclosed from ever joining the other students at the organization's office because it is inaccessible by wheelchair? A student I know recounted this story, his story, to a judge who is Black -- and tears sprang to his eyes in recognition of kindred segregation experiences.

Does one have to have a kindred experience of discrimination in order to recognize inequality in the treatment of another? It helps, but so does talking with others, asking when differential treatment is injurious, and when it is necessary, or preferred by those who are treated "differently." I think the cartoon of the dog at the typewriter suggests two lessons here. First, you can't know, sitting alone at your typewriter, whether what you or others believe fits the experiences of people unlike yourself. You have to talk with them and learn with them. Second, we can't remedy a past invidious discrimination by drawing simply a new invidious discrimination--by characterizing all dogs as quick and all foxes as lazy.

Equality will remain elusive until everyone pays attention to the perspectives of others. Sometimes this means recognizing -- re-cognizing -- an issue that seems to be about freedom, from one perspective, but is also about equality, from another point of view. Recent incidents at Stanford's Ujamma House there, the African-American theme house, provide an example you probably all know. Last September, a white student and a Black student had an argument over whether Ludwig van Beethoven had any Black ancestors; The Black student maintained that this was the case; the white student said this was preposterous. The following night a group of white students got drunk and marked up a poster of Beethoven to represent a Black stereotype. They then hung the poster outside the dorm room of the Black student who had had the argument with the white student. Shortly thereafter, a Black fraternity poster was defaced with the word "niggers." School officials identified a student responsible for defacing Beethoven poster, and began disciplinary proceedings.[3] Those proceedings ended with the recommendation of no discipline in light of the student's first amendment rights.[4]

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[3] See Felicity Barringer, Drives by Campuses to Curb Race Slurs Pose a Speech Issue, New York Times, April 15, 1989, p. 1, col 1.

[4] The white student was moved to different housing. Id. Groups of faculty and students, dissatisfied with the treatment of the incident, proposed to amend the university rules to permit punishment of speech that directly insults and stigmatizes individuals on the basis of race, sex, national origin, or sexual preference. Compare Lee Dembart, At Stanford, Leftists Become

Professor Patricia Williams, the first Black woman to teach at Stanford Law School, has criticized the disciplinary committee for privatizing the matter -- foreseeing no injury to anyone from what it viewed as First Amendment expression.[5] And Professor Williams also has written about how the incident injured her.

She wrote, "I am a first black pioneer just for speaking my mind. The only problem is that every generation of my family has been a first black something or other, an experimental black, a "different" black -- a hope, a candle and a credit to our race....I wonder when I and the millions of other people of color who have done great and noble things and small and courageous things and creative and scientific things--when our achievements will become generalizations about our race and seen as contributions to the larger culture, rather than exceptions to the rule, as privatized and isolated abnormalities....the most deeply offending part of the injury of the Beethoven defacement is its message that if I ever manage to create something as significant, as monumental, and as important as Beethoven's music, or the literature of the mulatto Alexadre Dumas or the mulatto Aleksander Pushkin's literature -- if I am that great in genius, and perfect in ability--then the best reward to which I can aspire, and the most cherishing gesture with which my

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Censors, New York Times, May 5, 1989, A35, col 2, with Sharon Gwyn, Muzzle the Stanford Bigots, New York times, May 12, 1989, A3, col. 1.

[5] Pat Williams, The Outgoing Shell: An Informal Essay on Formal Equality (unpublished draft).

recognition will be preserved, is that I will be remembered as white. Maybe even a white man...This should not be understood as a claim that Beethoven's music is exclusively black music, or that white people have no claim to its history or enjoyment; it is about the ability of black and brown and red and yellow people to name their rightful contributions to the universe of music or any other field. It is the right to claim that we are, after all, part of Western Civilization. It is the right to claim our existence....The failure of Stanford to acknowledge this level of the harm in the Ujaama House incident allows students to deface me. In the margins of their notebooks, or unconsciously perhaps, they deface me; to them, I "look like a stereotype of a black person," (as [the white student] described it) not an academic. they see my brown face and they draw lines "emphasizing [enlarging] the lips, and coloring in the "black frizzy hair." They add "red eyes, to give...a demonic look." In the margins of their notebooks, I am obliterated."[6]

I am moved by Pat Williams' decision to let me and others know a portion of the injury she experienced from the incident. I don't think I'll ever think of that incident, and others like it, the same way again. We can't really learn about the partiality of our own perspectives without talking with people about their perspectives. And their perspectives may help us rethink our own.

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[6] Id. (quoting from the disciplinary report of the white student's account of the incident).

I do not mean here to review the merits of the Stanford decision, nor to tell you how I think your institutions should resolve similar matters in the future, although I am certain you will face them. I do mean to ask, when we do face them, do we have confidence that we know the meanings of these incidents from the perspectives of people we do not know well? Can we imagine, to use the legal tests, what might be the meaning of a "clear and present danger" to a member of minority group who witnesses an incident like the one at Stanford? Whose is the average person's sensibilities, to which we lawyers will refer to judge the seriousness of an incident?[7] Or, using the words of the Supreme Court in Cohen v. California,[8] what kinds of persons do we have in mind in concluding that "No individual actually or likely to be present could reasonably have regarded the words...as a direct personal insult"?

In short, can we learn to look at perspectives other than our own, and then still others, continually unsettling our assumptions that we know what others think? This struggle, I think, is critical to the search for equality. It is a process of continual re-examinations of the treatment we allow our institutions to accord people. The lines used to divide people must be scrutinized and rescrutinized to incorporate the perspectives of those who have not in the past been consulted. Hearing a new perspective does not require deferring to it. The search is not simply for the fox's perspective, nor the dog's, but for a perspective that can see them both. That is still a perspective -- but is not one implying the normal and the deviant, the average and the marginal, but one looking to the relationships between human beings.

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[7] See Restatement (Second) of Torts, Sect. 46 (1965), which defines intentional infliction of emotional distress as a case "in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"

[8] 405 U.S. 15, 20 (1971)(finding first amendment protection for the words on appellant's jacket:"Fuck the Draft").

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What about that second cartoon of the judge with the nose and the mustache, who declares that a defendant with a similar face is "obviously not guilty." This is a cartoon about the problems of neutrality. On one level, it raises the question, can anyone be unbiased when it comes to judging people one resembles? The cartoon reveals what we who are protectors of the legal system sometimes shield from view: officials are fallible. One predictable form of fallibility is bias towards people like oneself -- and perhaps, correlatively, less sympathy towards people unlike oneself. We suffer from partial viewpoints, and risk bias as a result.

Actually, we lawyers may have developed a ridiculous over-sensitivity to the appearance of bias. In this age of talk about professional ethics, attention to the appearance of impropriety almost overshadows concern about wrongdoing. If one can cite a cartoon to support another cartoon, let me point to one of a man praying at the end of his bed, "Lord, please protect me from the appearance of impropriety."

Perhaps it was this concern with appearances that inspired the lawyers defending the law firm of Sullivan and Cromwell in a sex discrimination suit when they sought to disqualify Judge Constance Baker Motley, as Black woman, from sitting on the case. They argued that she would identify with those who had experienced race or sex discrimination. Judge Motley explained her decision not to recuse herself this way: "If background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex."[9]

Thus, there are several twists in recognizing the partiality of viewpoints. It is not enough to doubt the objectivity or neutrality of a particular judge who encounters a litigant who resembles herself in someway. It is also important to ask whether the asserted resemblance raises special doubts because the shared trait is itself perceived as different due to assumptions about a more general norm. Did the fact that Judge Motley shared her female gender with the plaintiff who sued the law firm stand out to the defendant because of an assumption that maleness is the norm in the courtroom, in the law firm, and in the application of law? If these deeper assumptions about difference are at work, the issue of "bias" in judgment actually boomerangs. The question now is whether those who would assume a woman is biased -- favorably -- about women are themselves biased, though adversely, about women. The recognition of bias and partiality of viewpoint must work both ways. The dangers to neutrality arise as much with those whose viewpoints happen to coincide with the dominant viewpoints as with those whose viewpoint may stand somewhat apart.

For me, this raises questions about the judicial treatment of another disciplinary action, this one brought by Dartmouth

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[9] Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4 (S.D.N.Y. 1975).

College against members of the Dartmouth Review, who had been sanctioned following their treatment of a minority faculty member. The court found a defect in the college's disciplinary committee process since a member had signed a statement prior to participation in the committee registering disapproval of the students' conduct. Again, many of you know more about this than I do. Let me just ask, how do you think bias should be treated here? It's not that I mean to doubt the bias of the member who had publicly announced a view. But why stop the scrutiny of bias there -- what about the other members, or any potential members? Why exactly are those members of the Dartmouth community who failed to criticize the students' treatment of a minority faculty member "unbiased"? What does neutral mean here? Shouldn't the search for objectivity start with the recognition that everyone has a bias? And now what are they doing to overcome it? This also reminds me of the search for a jury for Oliver North that had no exposure to the media coverage of the Iran-Contra hearings. Why does the definition of objectivity mean removal from the public debate over the issues of the day? Are such people neutral when, in some systematic way, they arrange their lives to miss the public debate?

By raising these questions, I do not mean to suggest that bias is never a problem. On the contrary. I think it is a much bigger problem that we usually acknowledge. We either think any knowledge about a subject means bias -- as if ignorance about it isn't bias. Or else we tend to see bias only in people unlike ourselves, miss what our own actions look like to others.

In this light, I wonder what neutrality means not just case by case, but in cases taken together. Consider, for example, two decisions made by the same disciplinary committee at Yale in 1986.[10] The committee lifted disciplinary measures that had been imposed against a student who had put up posters satirizing homosexual activities and depicting a particular faculty member and a particular student; the committee said this satire was legitimate speech, protected by the university's commitment to free expression. The very same committee suspended some other students, though, for participating in an anti-apartheid sit-in on university premises; the committee concluded that this activity was not protected speech. Of course, from our legal offices, we can draw sharp distinctions here: speech versus conduct, paper versus bodies, satire versus protest, disrespect for personal reputation and for a stigmatized group versus disrespect for property, trespass rules, and school authority. But how do these distinctions appear to gay and lesbian students in the community who wonder if they are now fair game for ridicule, and to students who view apartheid as evil and wonder if the university takes this view seriously?

Deciding what distinctions should matter, too often, happens before we even think about it. We take for granted distinctions we -- and others-- have drawn in the past. And we presume the starting points for analysis are what we already know well, which inevitably reflects who we are and where we've been -- with the likely effect of distinguishing us from others in our own community who have different points of reference and orientation. This isn't neutrality. It's mindless repetition of the non-neutral past.

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[10] See Edward Fiske, Free Speech Debate: Yale and Other Universities Ponder Boundaries of Student Expression, N.Y. Times. Oct. 4, 1986.

Even more generally, I wonder if we stray from neutrality because we tend to take for granted a frame of reference that is familiar to us, without pausing to justify it. We often don't even notice ourselves doing this, because it happens so quickly, as when we name a problem. I've thought about this in the context of the incidents at Stanford's Ujaama House. They have often been called by the name, "hate speech;" this triggers a free expression analysis. What we call a problem is half-way towards our treatment of it. Naming categorizes. We use our categories to tell us what to do.

Let's consider how we name the range of recent actions, not just the defaced Beethoven poster and the defaced poster of the Black fraternity, but also other incidents that occurred in the past school year: swaztikas and Ku Klux Klan graffitti on college walls and sidewalks, the defacement of posters announcing events for women's groups, Third World Coalitions, and gay and lesbian groups; notes slipped under dormitory room doors saying "African nigger, go home," and "If you talk once more in favor of abortion, you are going to get fucked;" and a male student wearing to a class on Women and the Law a t-shirt saying, "ban women lawyers." We could, and we should, consider the ways in which such actions are similar and different, and when the distinctions should matter in formulation official and unofficial responses. But even before we do this, how do we name these incidents? If we call them incidents of "hate speech," haven't we already decided to categorize them as problems of free expression?

Well, you may be thinking to yourself, that's what they are. And within our current legal culture, that's what most of us would tend to conclude. But this is because we take for granted some lines of thought, and neglect others that may be a bit less familiar. Consider an alternative name, "harassment." As your campuses develop codes against sexual and racial harassment, for example, statements and comments that once might have been viewed as simply free expression are now treated as impermissible harassment, depending upon the context.

Consider another alternative name, group defamation. In a classic article on that subject, written in 1942,[11] David Riesman--before he wrote about The Lonely Crowd -- explained as peculiar an American reluctance to regulate group defamation which he attributed both to the heavy legal emphasis on individualism, neglecting the significance of social groups, and to the American focus on capitalism, to the exclusion of concern for reputation based on honor, not merely commercial or financial status.[12] Riesman challenged the conventional American view that as the number of people within a labelled group expands, "the extravagance of the defendant's statements -- or his obvious misanthropy -- will discredit him without the need for legal interference."[13] "On the contrary," wrote Riesman, "where the defendant is engaged in exploiting the anxieties or the sadism of his audience, and can count on built-in prejudice, he may increase his credibility as he increases the scope and violence of his lies." Riesman offered Hitler's Mein Kemp as his footnote support, a timely reference not only in 1942.

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[11] David Riesman, Democracy and Defamation: Control of Group Libel, 42 Colum. L. Rev. 727 (1942).

Especially important for our purposes, Riesman emphasized the significance of social and political context to developing rules of libel and slander. He noted that "Lawyers, trained in the tradition of distinction-drawing and eschewing generalities, may find it difficult to recognize, or to admit, these 'nonlogical' factors in communication, although their training also teaches them the varying meanings which emotion may attach to words."[14] The line that is important, and difficult, to draw, is between social criticism and group defamation, but here Riesman recommended the common law technique of "wariness, putting out feelers here and withdrawing them there, as behavior is seen to react to the institutional changes."[15]

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[12] Id., at 730-731.

[13] Id., at 770.

[14] Id., at 770.

Attentive himself to his own social and political context, Riesman wrote that writers hostile to the use of libel law reflected the historical impact of absolutist state and authoritarian church powers. He wrote: "In the more or less democratic lands, however, the threat of fascism and the chief dangers to freedom of discussion do not spring from the 'state,' but from 'private fascist groups in the community. These groups try to repress criticisms of themselves, sometimes with the help of the government, but more often and more subtly by 'private' pressure and coercion." And this part of Riesman's comment seems particularly timely today: "Or the defamation aims shifted to relatively powerless scapegoats -- [N]egroes, Jews, Mexicans--the attacks which might otherwise be made against the prevailing system...In this state of affairs, it is no longer tenable to continue a negative policy of protection from the state; such a policy, in concrete situations, plays directly into the hands of the groups whom supporters of democracy need most to fear."[16]

Riesman, and others today, suggest that neutrality does not mean no state regulation. The state is not neutral when it permits some private groups to wield power over others. Does this view, however, contravene our liberal, constitutional commitments to freedom and limited state power? Interestingly, that great prophet of liberalism, John Stuart Mill, wrote in On Liberty about the social tyranny exercised by the majority that is more formidable than many kinds of political oppression, since "it leaves fewer means of escape, penetrating much more deeply into the details of life." He added, "Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its ideas and practices as rules of conduct."[17] You therefore may cite John Stuart Mill in support of contemporary codes against harassment of minorities that is otherwise silently countenanced by majorities.

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[15] Id., at 778.

[16] Id., at 779-790.

Notably, British, Canadian, and Italian laws, and even International Covenants on Civil and Political Rights give anti-racism precedence over freedom of expression. Italy forbids the dissemination of ideas based on racial superiority or race hatred; Britain forbids public speech or publication of threats, insults, and abuse likely to stir up race hatred against any racial group in Britain,;[18] Canada's Charter of Rights and Freedoms includes a strong endorsement of free expression but simultaneously limits hate propaganda.[19]

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[17] J.S. Mill, On Liberty 4 (B. Blackwell ed. 1946).

[18] David Kretzmen, Freedom of Speech and Racism, 8 Cardozo L. Rev. 445, 448-500 (1987). See also Kenneth Lasson, Racism in Great Britain: Drawing the Line on Free Speech, 7 Boston College Third World L. J. 161 (1987)

Even in the United States, despite a general disapproval of government restrictions against group defamation,[20] the Supreme Court has unanimously treated as forbidden sex discrimination any sexual harassment which creates a hostile or abusive work environment.[21]

Perhaps along with some of you, I fear threats to freedom of expression especially in an era when Chinese students are executed for speech and leading government officials seek to amend the constitution to prohibit protests using the American flag. Yet, we may act too much out of fear, so much that we neglect to speak out against injuries we should not tolerate. If some acts of hate clearly seem harassment, or discrimination, shouldn't we treat them as such, and not fear we will lose the ability to draw distinctions in the future? There are ways to name injuries and abuses that we miss if we simply label the incidents a form of "speech".[22]

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[19] Debate: Holocaust Denial, 8 Cardozo L. Rev. 559, 564 (1987)(remarks of Irwin Cotler).

[20] See generally Hardley Arkes, Civility and the Restriction of Speech, Rediscovering the Defamation of Groups 1974 Supreme Court Review 281 (discussing and challenging contemporary disapproval of Beauharnais v. Illinois, 343 U.S. 250 (1952) and Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

[21] Meritor v. Vinson, 477 U.S. 57. For an analysis relating this case to the treatment of racist speech, see John Denvir & John Powell, Caliban's Complaint: Racist Speech and the First Amendment (draft 1989). See also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973)(any interest in free expression found too small to justify sex-segregated "help-wanted" newspaper advertisements in light of the human rights ordinance forbidding sex discrimination).

At the same time, consistent with respecting freedom of expression, can't we develop ways for members of our own communities to express effectively and vividly their own disapproval of acts of hate -- ways to shame or shun those who commit them? As members of our communities, committed to free speech, shouldn't you and I speak out against hate speech? Doing nothing, in this circumstances, is hardly neutral.

Thinking back on the judge with the big nose and mustache, I wonder if we can all learn to pause before leaping to the conclusion that we recognize what is before us. Before naming an incident, can we think about the multiple perspectives from which it may be viewed -- and named -- and analyzed? Given the inevitable impact of our position on our perspectives, and our perspectives on our judgments, can we work for neutrality by searching out perspectives that we do not initially know?

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[22] Professor Charles Lawrence of the Stanford Law School has powerfully argued that Brown v. Board of Education itself is a decision favoring anti-racism to free expression, since there the Court expressly rejected racially segregated schools because of the message of racial inferiority those schools gave to Black school children. Charles Lawrence, When Racism Dresses in Speech's Clothing: Reconciling the First and Fourteenth Amendments, presented to the 1987 Biennial Conference of the American Civil Liberties Union, University of Wisconsin, Madison Wis. (June 15-18, 1989). And Professor Regina Austin of the University of Pennsylvania Law School has developed a strong argument against workplace harassment drawing on the perspectives of workers, especially those who are members of minority groups. Regina Austin, Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress, 41 Stan. L. Rev. 1 (1988).

What about the third cartoon about the minister, charged with a holier than thou attitude, who writes the complainant, "I forgive you." Why is this funny? It notes the self-sealing quality of so many beliefs. The minister recapitulates exactly what he is charged with even in his effort to respond. The cartoon has the quality of a paradox, such as: "I am the most modest person I know." It's like my favorite joke about the rabbi, the cantor, and the shammas in the synagogue. As they prepare for the service, the rabbi suddenly throws himself down on the ground. Staring to the heavens above, he says, "Lord above all, before I am I nothing, I am less than a speck of dust; protect me, bless me!" The cantor, preparing his music, looks over at the rabbi on the floor, and the cantor, too, throws himself on the ground. "Before you, Almighty God, I am nothing, I am less than a squeak of the door, bless me, protect me!" The shammas, the janitor, is in the back of the sanctuary, mopping up. He looks over, and sees the rabbi on the floor, the cantor on the floor -- what's he going to do? The Shammas, too, throws himself down, and says, "Before you, oh Lord, I am nothing, nothing! Bless me, protect me!" Then, the cantor nudges the rabbi, points at the Shammas and says, "Look who thinks he's nothing!"

These stories reveal the paradoxes created by the boundaries of our own thoughts. We are unself-conscious as we repeat the very mistakes we mean to correct. I think that this problem permeates the search for tolerance in the law. Here, examples of in the legal treatments of religious tolerance, women in the workplace, and contrasting sexual orientations, are striking. Judges often perpetuate traditional distinctions even as they claim to implement commitments to tolerance, and I wonder if, in the future, we can do better.

Repeating the intolerance we were trying to avoid sometimes seems apparent in hindsight. Consider the early case from Connecticut which was one of the first colonies to adopt religious freedom provisions. Nonetheless, a Connecticut court found no problem in refusing to accept court testimony from witnesses who declined to swear on the Protestant bible. The court reasoned that those individuals could make no claim of religious intolerance: they could still practice their own religions. They just could not be called as witnesses in court, and the state's refusal to allow them to testify was ruled not to burden their religious freedom.

But such insensitivities are not antiquated. In 1988, the U.S. Supreme Court rejected an Indian tribe's claim that the government violated the religious freedom of its members by proposing a road that would intrude upon and destroy the tranquility of a sacred site.[23] The Court admitted that the proposed action would burden the religious freedom of the tribe members, and also conceded that the governmental interest was not especially compelling. Nonetheless the Court rejected the challenge; the majority failed to see this burden as serious, and deserving relief where the government action was not coercive.

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[23] Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S.Ct. 1319 (1988).

Similarly, the Supreme Court rejected the claim that the presentation of a creche scene on public property unconstitutionally established religion.[24] The Court thereby indicated insensitivity not only to non-Christians, by doubting they would be offended, but also to observant Christians by suggesting that the creche presented no religious symbolism but was merely an earmark of the season, like Santa Claus.

These decisions are especially striking compared with moments when the courts seem to understand what they do not understand, and implement tolerance by changing the ground rules. For example, in 1987, the Court considered whether a state could deny unemployment benefits to a woman who left her job when her employer assigned her to work on her Sabbath.[25] The state law allowed benefits only to those unemployed through no fault of their own. The Court reasoned it would be wrong to treat her religious beliefs as her own fault because the proper question instead was whether the denial of benefits burdened her religious exercise, and the Court answered that the denial posed an unacceptable burden by punishing her religious observance.

I found this recognition of the alternative starting point -- the demands of religious observance -- specially powerful because it departs from the earlier view that it is no constitutional violation to exclude a person from otherwise available public opportunities when that person chooses to exercise his or her religion. It is wrong to use the norm of the nonreligious person in defining the scope of unemployment benefits. The Court's reasoning was powerful too because it showed an understanding of the complexity of choice: one could choose to observe one's religion despite conflict with one's job and still not be properly deemed to be unemployed due to one's own fault.[26]

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[24] Lynch v. Donnelly, 465 U.S. 668 (1984).

[25] Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

Tolerance means "inclusion" but actually that is not enough. To many people who have been made marginal in the past, inclusion sounds like, "come on in, but don't change anything." Inclusion sounds like, "you're welcome to join what we do, but we're not going to change what we do." What a different result would emerge if the meaning of tolerance, for differences, were widely understood as including the varieties of human beings within the norm against which equality is measured. Notice, this is different than simply calling for inclusion --include women, minorities within your institution. This is a call for thinking about women, minorities, persons with disabilities, in the definition of the person used to construct the institutions. People should not be made marginal simply because their physical condition, sex, race, or religion wasn't in the minds of those who designed the institution. This is a call for scrutinizing our reluctance to remake our institutions. This is a call to look from the many perspectives of those who still sense rejection or subordination.

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[26] This is all particularly remarkable in contrast to the Court's treatment of gender differences. The same year it called for accommodating the religious employee, the Court approved a state's denial of unemployment benefits to a woman who left her job due to pregnancy. Wimberly v. Labor & Indus. Relations Comm'n, 107 S.Ct. 821 (1987). The state statute refused benefits to anyone who left for reasons unrelated to the employer. Here, again, an apparently personal choice was used to defeat otherwise available benefits. The Court approved the norm of a nonpregnant person to guide the unemployment compensation scheme.

If we search out those perspectives, I think we'll come to hear that it is inadequate comfort to those who are injured to call abusive incidents isolated, trivial, or merely symbolic. A Black woman I know who works at a predominantly white university recently had the shock of learning of a Ku Klux Klan presence in the university. Her white friends tried to reassure her that there was nothing to fear from such a kooky, marginal group; her response was to ask, "How can I feel safe when my friends don't respect my sense of danger?"

This brings me to the legal treatment of the Gay Rights Coalition at Georgetown University. A group of gay and lesbian students argued that school authorities violated a local ordinance forbidding discrimination on the basis of sexual orientation when it refused to grant official recognition to the gay students organization. The university had a pretty good argument: it claimed that a governmental requirement to recognize the gay students would violate this Catholic university's right to the free exercise of religion. Given Catholic teaching that homosexuality is sinful, the District of Columbia court found that Georgetown could not be compelled to recognize the student organization.[27] The court concluded that mandatory endorsement would indeed amount to "compelled expression in violation of the first amendment."[28] The court did rule that the student groups was entitled to the tangible facilities afforded to other comparable organizations, but not to university's recognition.

In some ways, this may look like a happy compromise; the students are assured use of facilities and the University can preserve its religiously-inspired position. But I wonder where homosexual persons fit in the court's understanding: people to be put up with, or people who are members of the institution, and the larger society? By accepting the university's view that recognizing the gay students group would mean endorsing homosexuality, the court conflated two distinct questions: must the university treat the gay students group the same way it would any other student group, on the one hand, versus must the university approve homosexuality, on the other. Once again, I am drawing a distinction about the ways we draw distinctions.

The court failed to distinguished university "recognition" from "endorsement." Yet, the idea that university "recognition" is the same as "endorsement" is far from obvious. Indeed, the

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[27] Gay Rights Coalition of Georgetown University Law Center v. Georgetown University, 536 A.2d 1 (D.C. 1987).

[28] id., at 25.

U.S. Supreme Court rejected that view in Widmar v. Vincent,[29] which required a public university to allow an officially recognized student religious group to use school facilities, and noted that university students could not reasonably conclude university endorsement from the "mere fact of a campus meeting place."[30] Moreover, the D.C. court leaves open the possibility that universities may still differentiate on the basis of sexual orientation so long as there are no material disparities. Shades of separate but equal.[31]

In closing, to forge the decade of distinction, I think we need to stop making distinctions out of habit, out of mindless repetition of tradition and familiarity. And we need to learn to make distinctions when our failure to do so wrongly injures or excludes people. All of this means looking at the issues of equality, neutrality, and tolerance from the vantage points of people who were not kept in mind when our institutions were designed. We can all learn from the occasions when we do glimpse a point of view other than our own. Such occasions can remind us to be more vigilant about presuming that our viewpoint is the only one we need to know.

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[29] 454 U.S. 263, 274 n.14, 277 (1981).

[30] See also 556 A.2d at 53 (Ferren, J., concurring in part in the result and dissenting in part); Developments--Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1669-1670 (1989).

[31] 556 A.2d at 49-50 (Ferren, J.). I also wonder if, rather than viewing the commitments to freedom and equality as in tension, is it possible to understand them as complimentary? John Powell, Executive Director of the American Civil Liberties Union, recently made such an argument both noting that "Both the First and Fourteenth Amendments are concerned with the development of one's self in a cultural context. Development of the self cannot exist if there is not some form of equality, such as equality of respect and the ability to participate ...in a community." Speech, Pace University, April 23, 1989.

Looking back at the three cartoons, I think there are some lessons to help us hold at bay the legacies of distinctions drawn on the basis of race, sex, sexual orientation, and disability -- and some lessons to help us make even more distinguished institutions in the future.

The first lesson is for equality. To be meaningful, equality requires looking from multiple perspectives. It means paying attention to contexts and acknowledging the limits of one's own point of view. It doesn't mean caving into a point of view you don't share; it does mean learning about other points of view rather than pretending yours is the same as everyone's.

The second lesson is for neutrality. Again, to be meaningful, neutrality requires us to look for starting points and expose them to questions; to recognize the partiality of every viewpoint. It also means guarding against disqualifying a viewpoint merely because it is partial. It means learning to consult, collaborate, and participate in overcoming the partiality of everyone's perspective.

The third lesson is for tolerance. To be meaningful, tolerance demands that we expose to view the unstated norms or distinctions we usually rely on and challenge the views of view embedded in our institutional practices. It means doing more than inviting outsiders to be included -- it means listening to their views about what it would take for them to feel included. In colleges and universities, this means dialogue -- dialogue about equality, neutrality and tolerance, about discipline and freedom, about injury and harassment.[32] It means considering the preconditions for participation -- the preconditions for assuring that every member of the community feels like a member of the community.

And that means the courage to challenge old distinctions, but make new ones, to be tolerant but also to be intolerant -- that is, toward behavior that prevents anyone else from feeling safe in our communities. That would make the '90's truly distinguished.

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[32] The consequences of the idea of dialogue for free speech could be quite important. See Denvir and Powell, supra: "If we substitute the 'dialogue' metaphor for that of a "market place of ideas" we get a different perspective on the proper role of speech in a democracy. Instead of a laissez-faire approach which sees the only evil as the suppression of speech based on its message, we envision a government which aims at "husbanding" our public dialogue. The primary goal of the First Amendment is now seen as the establishment of the preconditions for an intelligent conversation between political equals." (footnotes omitted).

[redacted]

The Pitfalls Of Stifling Campus Speech

Rules designed to protect students from racism or sexism can run counter to free-speech guarantees. Programs that foster understanding might be a better alternative.

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By Robert M. O'Neil

ONE OF OUR STUDENTS wrote me recently to protest the presence in our student daily of an insert that she found deeply offensive. The issue, she argued, was not one of censorship; the material was blatantly sexist. "Discrimination such as this," she insisted, "must not be tolerated." She closed by asking, "What can be done about this incident?"

The question is a valid and recurring one at many university campuses. It is a question to which the answers are curiously unsatisfying. Growing numbers of institutions have fashioned new rules to meet the challenge, some forbidding religious or ethnic slurs and stereotyping or banning the use of racist or sexist language.

■ The Michigan lesson

The University of Michigan took this approach when it formulated its antidiscrimination policy. Before the policy's recent revision, it prohibited "any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, national origin, sexual orientation, creed, ancestry, age, marital status, handicap, or Vietnam-veteran status." The catalyst for the rule seems to have been an incident last spring in which anti-Semitic remarks and racist jokes were broadcast on a campus radio station; the faculty responded by insisting on more rigorous standards of speech as well as conduct.

The Michigan rule did not fare well

in the courts. Nor did the courts have much enthusiasm for city ordinances designed several years ago to ban various forms of demeaning material under the rubric of sex discrimination. In such cases, judges found even the most laudable goals insufficient to warrant creating new exceptions to principles of free speech and press.

Therein lies the dilemma. The worthiest motives prompt efforts to restrict speech that may wound, embarrass, or offend. Proponents of such measures wish not only to protect sensitive feelings, but also to maintain or restore civility to an often uncivil environment. They especially—and rightly—insist on civility within the academic community; slurs and epithets have a particularly corrosive effect on fragile intergroup relations in the learning environment—an environment that demands tolerance and understanding.

All these values underlie rules directed at racist and sexist speech on college campuses. The people who oppose such rules seldom question the validity of the values or the sincerity of those who invoke them. Instead, they point to enduring precepts of free expression that compel Americans to tolerate much speech and press that they find offensive or abhorrent. As recently as last June, in striking down flag-desecration laws, the Supreme Court reminded us: "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

The question then becomes, at its core, whether the special interests that underlie restrictive campus rules can or should override the historic guarantees of free speech.

■ The legal framework

The answer is less clear than one might wish. Freedom of expression is not unqualified. Exceptions have been made over the years (1) for speech that poses a clear and present danger of serious harm, (2) for obscenity, (3) for some forms of libel, and (4) most recently for the use of children in producing pornography. While any such exception must be defined precisely and proved carefully, speech may be limited in such compelling situations.

None of those exceptions quite covers the issue at hand, but the Supreme Court nearly 50 years ago created one other loophole that may be more relevant in some cases of racist or sexist speech—it allows restriction of "fighting words," or face-to-face insults that are likely to bring disputants to blows. That doctrine has seldom been applied in recent years, but it remains on the books as a possible, if tenuous, ground for banning racially and ethnically demeaning speech.

Finally, conduct that can be separated from expression may be punished even if the related speech must be tolerated. On that basis, the Supreme Court upheld a federal law that banned destruction of draft cards, even in protest. The problem here is whether the conduct and the expression can be clearly separated; the risk is that ideas or their expression may be suppressed in the guise of regulating behavior.

In this context, the recent campus rules raise constitutional concerns of two types. The definition of the forbidden activity often leaves much to be desired; the federal judge who recently ruled against the University of Michigan's rule found its terms unacceptably vague and imprecise.

The other flaw is more basic. Most such rules do not rest upon, or limit their terms to, the categories of expression that fall outside constitutionally protected speech or press. Such rules may include, but do not stop with, words that are obscene, defamatory, or almost certain to provoke a fight. To the degree that they go beyond the recognized exceptions, they attempt to restrict activities that the framers of the First Amendment meant us to tolerate.

Such rules also embody serious flaws in policy. The premise of such rules is that sexist, racist, and ethnically demeaning speech is so deeply abhorrent that the normal rules do not apply. We can, in other words, set up a double standard if we really object deeply enough to what is being said. Such a claim is tempting indeed, for the case here could hardly be more compelling.

Yet the exception we make today to combat anti-Semitism or racism or sexism may well return to haunt us tomorrow in a quite different context that may seem equally compelling to some people—for example, to those offended by taboo words in books and magazines or by references they deem sacrilegious. Only rigorous adherence to a single standard of speech and its regulation avoids that risk.

■ Making choices

What can a conscientious institution do short of banning racist and sexist speech? There may be several promising avenues. One surely is to explore the full potential of the recognized and established exceptions to the First Amendment. Some racial diatribes and caricatures might indeed be shown to create a clear and present danger, and material demeaning to women might occasionally be proved legally obscene.

In some instances, conduct may be sufficiently detached from speech that it can be regulated without stifling ideas and their expression. The occasions for such traditional sanctions would undoubtedly be rare but not inconceivable. Sanctions might even be imposed against groups and organizations without abridging the speech of individuals. The fraternity that displays a crude effigy or disseminates advertisements that demean women might be denied certain campus privileges, even for transgressions for which an individual could not be punished.

More attractive are the essentially educational options befitting an academic community. A faculty and administration that loudly condemn racial caricature and ethnic slur do not abridge a student's freedom of speech. An educational program, whether optional or required, designed to increase tolerance and eliminate bigotry, enhances free expression and inquiry. Inviting formal complaints from people aggrieved by demeaning speech violates no civil liberty as long as punishment reaches only conduct, not thoughts or words.

Much creative thought needs to be given to these issues, especially at institutions beset by intergroup tensions. Yet the lesson of recent months is that no campus, however harmonious or tranquil it may seem, is immune. Educational programs, forums, dialogues, and the like should place a high priority on promoting tolerance, civility, and trust.

"If there be time . . . to avert the evil by the process of education," Justice Brandeis insisted 75 years ago, "the remedy to be applied is more speech, not enforced silence." ■

The Campus: "An Island of Repression In a Sea of Freedom"

Chester E. Finn, Jr.

TWO WEEKS before the Supreme Court held that the First Amendment protects one's right to burn the flag, the regents of the University of Wisconsin decreed that students on their twelve campuses no longer possess the right to say anything ugly to or about one another. Though depicted as an anti-discrimination measure, this revision of the student-conduct code declares that "certain types of expressive behavior directed at individuals and intended to demean and to create a hostile environment for education or other university-authorized activities would be prohibited and made subject to disciplinary sanctions." Penalties range from written warnings to expulsion.

Several months earlier, the University of Michigan adopted a six-page "anti-bias code" that provides for punishment of students who engage in conduct that "stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status." (Presumably this last bizarre provision applies whether the "victim" is labeled a war hero or a draft dodger.)

Nor are Wisconsin and Michigan the only state universities to have gone this route. In June, the higher-education regents of Massachusetts prohibited "racism, anti-Semitism, ethnic, cultural, and religious intolerance" on their 27 campuses. A kindred regulation took effect on July 1 at the Chapel Hill campus of the University of North Carolina. And in place for some time at the law school of the State University of New York at Buffalo has been the practice of noting a student's use of racist language on his academic record and alerting prospective employers and the bar association.

Not to be outdone by the huge state schools, a number of private universities, like Emory in Atlanta and Stanford in California, have also made efforts to regulate unpleasant discourse and what the National Education Association terms "ethnoviolence," a comprehensive neologism that includes "acts of insensitivity."

Proponents of such measures are straightforward about their intentions. Says University of Wisconsin President Kenneth Shaw of the new rule: "It can particularly send a message to minority students that the board and its administration do care." Comments Emory's director of equal opportunity: "We just wanted to ensure that at a time when other universities were having problems that we made it clear that we wouldn't tolerate graffiti on walls or comments in classes." And in Massachusetts, the regents concluded that "There must be a unity and cohesion in the diversity which we seek to achieve, thereby creating an atmosphere of pluralism."

This "pluralism" is not to be confused with the version endorsed by the First Amendment. Elsewhere we are expected, like it or not, to attend to what Justice Brennan calls the "bedrock principle . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Not so for those running universities. "What we are proposing is not completely in line with the First Amendment," a leader of Stanford's student government has acknowledged to a reporter, but "I'm nor sure it should be. We . . . are trying to set a standard different from what society at large is trying to accomplish." Explains the Emory official: "I don't believe freedom of speech on campus was designed to allow people to demean others on campus." And a Stanford law professor contends that "racial epithets and sexually haranguing speech silences rather than furthers discussion."

DISREGARD the hubris and the sanctimony. Academics and their youthful apprentices have long viewed their own institutions and causes as nobler than the workaday world and humdrum pursuits of ordinary mortals. Forget, too, the manifest evidence of what some of the nation's most esteemed universities are teaching their students about basic civics. Consider only the two large issues that these developments pose, each freighted with a hefty burden of irony.

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The first can still evoke a wry smile. We are, after all, seeing students pleading for controls to be imposed on campus behavior in the name of decency and morality. Yet these same students would be outraged if their colleges and universities were once again to function *in loco parentis* by constraining personal liberty in any other way. What is more, faculties, administrators, and trustees are complying with the student demands; they are adopting and—one must assume—enforcing these behavior codes. By and large, these are the same campuses that have long since shrugged off any serious responsibility for student conduct with respect to alcohol, drugs, and promiscuity (indeed, have cheerily collaborated in making the last of these behaviors more heedless by installing condom dispensers in the dorms). These are colleges that do not oblige anyone to attend class regularly, to exercise in the gym, to drive safely, or to eat a balanced diet. A student may do anything he likes with or to his fellow students, it appears, including things that are indisputably illegal, unhealthy, and dangerous for everyone concerned, and the university turns a blind eye. But a student may not, under any circumstances, speak ill of another student's origins, inclinations, or appearance.

The larger—and not the least bit amusing—issue is, of course, the matter of freedom of expression and efforts to limit it. That the emotionally charged flag-burning decision emerged from the Supreme Court the same month as authorities in China shot hundreds of students (and others) demonstrating for democracy in the streets of Beijing is as stark an illustration as one will ever see of the gravity and passion embedded in every aspect of this question.

In the Western world, the university has historically been the locus of the freest expression to be found anywhere. One might say that the precepts embodied in the First Amendment have applied there with exceptional clarity, and long before they were vouchsafed in other areas of society. For while private colleges are not formally bound by the Bill of Rights, they, like their public-sector counterparts, are heirs to an even older tradition. The campus was a sanctuary in which knowledge and truth might be pursued—and imparted—with impunity, no matter how unpopular, distasteful, or politically heterodox the process might sometimes be. That is the essence of academic freedom and it is the only truly significant distinction between the universities of the democracies and those operating under totalitarian regimes. Wretched though the food and lodging are for students on Chinese campuses, these were not the provocations that made martyrs in Tiananmen Square. It was the idea of freedom that stirred China's students and professors (and millions of others, as well). And it was the fear of allowing such ideas to take root that prompted the government's brutal response.

Having enjoyed almost untrammeled freedom of thought and expression for three and a half centuries, and having vigorously and, for the most part, successfully fended off efforts by outsiders (state legislators and congressional subcommittees, big donors, influential alumni, etc.) to constrain that freedom, American colleges and universities are now muzzling themselves. The anti-discrimination and anti-harassment rules being adopted will delimit what can be said and done on campus. Inevitably, this must govern what can be taught and written in lab, library, and lecture hall, as well as the sordid antics of fraternity houses and the crude nastiness of inebriated teenagers. ("The calls for a ban on 'harassment by vilification' reached a peak last fall" at Stanford, explained the New York *Times*, "after two drunken freshmen turned a symphony recruiting poster into a black-face caricature of Beethoven and posted it near a black student's room.")

CONSTRAINTS on free expression and open inquiry do not, of course, depend on the adoption of a formal code of conduct. Guest speakers with controversial views have for some years now risked being harassed, heckled, even shouted down by hostile campus audiences, just as scholars engaging in certain forms of research, treading into sensitive topics, or reaching unwelcome conclusions have risked calumny from academic "colleagues." More recently, students have begun to monitor their professors and to take action if what is said in class irks or offends them.

Thus, at Harvard Law School this past spring, Bonnie Savage, the aptly-named leader of the Harvard Women's Law Association (HWLA), sent professor Ian Macneil a multicount allegation of sexism in his course on contracts. The first offense cited was Macneil's quoting (on page 963 of his textbook) Byron's well-known line, "And whispering, 'I will ne'er consent,'—consented." This, and much else that he had said and written, the HWLA found objectionable. "A professor in any position at any school," Savage pronounced, "has no right or privilege to use the classroom in such a way as to offend, at the very least, 40 percent of the students. . . ."

This was no private communication. Savage dispatched copies to sundry deans and the chairman of the faculty-appointments committee because, she later explained, "We thought he might be considered for tenure." The whole affair, Macneil responded in the *Harvard Law Record*, was "shoddy, unlawyerlike, reminiscent of Senator McCarthy, and entirely consistent with HWLA's prior conduct." As for the Byron passage, it "is in fact a perfect summary of what happens in the Battle of Forms" (a part of the contract-making process).

Macneil is not the only Harvard professor to have been given a hard time in recent years for writing or uttering words that upset students, however well-suited they might be to the lesson at hand. Not long ago, the historian Stephan Thernstrom was accused by a student vigilante of such classroom errors as "read[ing] aloud from white plantation owners' journals 'without also giving the slaves' point of view.'" Episodes of this kind, says Thernstrom, serve to discourage him and other scholars from even teaching courses on topics that bear on race and ethnicity.*

Nor is Harvard the only major university where student allegations, unremonstrated by the administration, have produced such a result. At Michigan last fall, the distinguished demographer, Reynolds Farley, was teaching an undergraduate course in "race and cultural contact," as he had done for the previous ten years, when a column appeared in the Michigan *Daily* alleging racial insensitivity on his part, citing—wholly out of context, of course—half a dozen so-called examples, and demanding that the sociology department make amends. Farley was not amused and, rather than invite more unjust attacks, is discontinuing the course. Consequently 50 to 125 Michigan students a year will be deprived of the opportunity to examine issues of ethnicity and the history of race relations in America under the tutelage of this world-class scholar. And to make matters even worse, Farley notes that several faculty colleagues have mentioned that they are dropping any discussion of various important race-related issues from their courses, lest similar treatment befall them.

This might seem perverse, not least from the standpoint of "aggrieved" students and their faculty mentors, because another of their major goals is to oblige everyone to take more courses on precisely these topics. "I would like to see colleges engage all incoming students in mandatory racial-education programs," writes William Damon, professor of psychology and chairman of the education department at Clark University, in the *Chronicle of Higher Education*. And his call is being answered on a growing number of campuses, including the state colleges of Massachusetts, the University of Wisconsin, and the University of California at Berkeley.

Ironies abound here, too, since the faculties and governing boards adopting these course requirements are generally the very bodies that resist any suggestion of a "core curriculum" or tight "distribution requirements" on the ground that diverse student preferences should be accommodated and that, in any case, there are no disciplines, writings, or ideas of such general importance that everyone should be obliged to study them. Curricular relativism can be suspended, though, when "pluralism" is itself the subject to be studied. "It is important to make such programs mandatory," Professor Damon explains, "so that they can reach students who otherwise might not be inclined to participate."

SAVE for the hypocrisy, this may appear at first glance to be part of an ancient and legitimate function of college faculties: deciding what subjects are of sufficient moment as to require students to examine them. If a particular university has its curricular priorities askew, requiring the study of racism rather than, say, mathematics, one can presumably enroll elsewhere (there being about 3,400 institutions to choose from).

A second glance is in order, however, before conceding legitimacy. What is commonly sought in these required courses, and the non-credit counterparts that abound on campuses where they have not yet entered the formal curriculum, is not open inquiry but, rather, a form of attitude adjustment, even ideological indoctrination. Thus Professor Damon:

> Such programs should emphasize discussions in which trained instructors explore students' beliefs concerning racial diversity and its societal implications. . . . They should cover, and *provide clear justification for, any racially or ethnically sensitive admissions or hiring criteria* that students may see on campus. [Emphasis added]

Along similar lines, the Massachusetts regents insist that each campus provide "a program of educational activities designed to enlighten faculty, administrators, staff and students with regard to . . . ways in which the dominant society manifests and perpetuates racism." So, too, the Berkeley academic senate last year voted (227 to 194) to begin requiring all undergraduates to sign up for new courses in "American cultures" in which they will explore questions like, "How have power relations between groups been manifested in such matters as racism, economics, politics, environmental design, religion, education, law, business, and the arts in the United States?"

In response to Professor Damon's description of the instructional goals of the mandatory course he is urging, Harvard's Thernstrom wrote in a letter to the *Chronicle of Higher Education:*

> Justification? Is that what educators are supposed to provide? For "any" criteria that omniscient administrators choose to adopt? . . . How about a mandatory course providing "a clear justification" for American foreign policy since 1945? Or one justifying the Reagan administration's domestic policies? . . . True, Professor Damon declares that such courses should "avoid preaching and indoctrination," but it seems to me that providing "justification" for highly controversial social programs cannot be anything but indoctrination.

Whether this bleak assessment will prove accurate hinges in large part on who ends up teaching these courses and the intellectual norms to which they hew. With scholars of the stature of Farley and Thernstrom already deterred—coerced into self-censorship—it is likely that colleges will enlist as instructors people who agree that the purpose of these "education" efforts is more political than intellectual. Such individuals are not hard to find in the curricular domain now known as "cultural studies." In this field, acknowledged Professor Donald Lazere at the 1988 conference of the Modern Language Association (MLA), "politics are obviously central." Indeed, the agenda of the field itself was defined by Richard Johnson, an Englishman who is one of its leading figures, as

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* See "A New Racism on Campus?" by Thomas Short, COMMENTARY, August 1988.

> a series of critiques of innocent-sounding categories or innocent-sounding practices, obviously culture, and art and literature, but also communication, and consumption, entertainment, education, leisure, style, the family, femininity and masculinity, and sexuality and pleasure, and, of course, the most objective-sounding, neutral-sounding categories of all, knowledge and science.

It is not far from MLA discussions to campus staffing decisions. Here is how the historian Alan C. Kors of the University of Pennsylvania describes the organization of a dorm-based program to educate students at his institution about "racism, sexism, and homophobia":

> [W]hat the administration has done, in fact, is turn this education of the students over to ideologically-conscious groups with ideological and political agendas, namely, the "Women's Center" and the Office of Affirmative Action. . . . These are people who have been granted, in effect, to use a term they like, the "privileged ideological position" on campus. Now the notion that the Penn Women's Center speaks for Penn women is absurd, since it obviously doesn't speak for more than a very small minority of a diverse, individuated female population. . . . But the university's administration has an easy way of buying off certain pressure groups, and it consists of giving those in possession of privileged ideologies the responsibility for reeducating students and faculty with improper attitudes. As a result, you really have the foundations of a University of Beijing in Philadelphia.

THESE additions to the formal and informal curricula of American colleges and universities, like the behavior codes and anti-harassment policies the institutions are embracing, are invariably promulgated in the name of enhancing "diversity" on campus. That has become the chief purpose of present-day affirmative-action hiring and admissions policies, too. It has, after all, been a while since one could observe prospective students or instructors turned away in any numbers at the campus gates because they were women or minority-group members or because of their religion or handicap. The one exception in recent years has been Asian students, whose dazzling academic performance led some universities to impose admission quotas lest this group become "overrepresented" in the student body. Asians, in fact, recently won a victory at Berkeley, when the chancellor apologized for admissions policies that had held down their numbers and announced a new one. The changes include raising from 40 to 50 percent the fraction of Berkeley undergraduates who will be admitted on the basis of academic merit alone; the other half must be "underrepresented minorities." (The likely impact of this new policy will be to maintain the enrollment shares of black and Hispanic students, to boost the numbers of Asians admitted, and to cause a drop in white matriculants, who plainly will not make it as a minority and who may be trounced by the Asians in the merit competition.)

With these few exceptions, however, affirmative action in the late 80's has nothing to do with invidious discrimination on grounds of race, gender, etc. Most colleges and universities would kill for more blacks and Hispanics in their student bodies and for more of the same minorities, as well as more women, in their faculties. (The only reason they are not equally eager for additional female *students* is that women today constitute a clear majority of the nation's 12.8 million higher-education enrollees.) "Diversity," then, is now the goal.

That we have generally grown used to this in matters of campus admission and employment does not mean that the academy lacks the capacity to surprise and dismay. These days that capacity usually entails a faculty-hiring decision where the race or gender or ideology of the candidate is entangled with his academic specialty. In recent months, I have run into several outstanding young (white male) political scientists who are finding it impossible to land tenure-track teaching posts at medium- and high-status colleges because, as one of them wryly explained to me, their scholarly strengths lie in the study of "DWEMs." When I confessed ignorance of the acronym, he patiently explained that it stands for "Dead White European Males." Had they specialized in revolutionary ideologies, the politics of feminism and racism, or trendy quantitative social-science methodologies, they could perhaps have transcended their inconvenient gender and mundane color and have a reasonable shot at academic employment. But to spend one's hours with the likes of Aristotle, Machiavelli, Hobbes, and Burke is to have nothing very important to offer a political-science department today, whatever one's intellectual and pedagogical accomplishments.

One can, by contrast, get wooed by the largest and most prestigious of academic departments, no matter how repugnant one's own views, provided that one offers the right blend of personal traits and intellectual enthusiasms. Richard Abowitz recently recounted the efforts by the University of Wisconsin to attract June Jordan, a radical black activist (and poet), from Stony Brook to Madison.* After examining her writings and orations spanning the previous fifteen years, Abowitz concluded that, if Jordan remained true to form, "her courses at the University of Wisconsin would do nothing more than propagate the crudest forms of social, political, and economic prejudice," exactly the attitudes that the university has dedicated itself to wiping out through such measures as the new student conduct code. Yet with but a single abstention, Madison's English department voted unanimously to offer her a tenured position with a generous salary. (Berkeley's offer must have been even more attractive, for that is where Jordan now teaches.)

Esoteric forms of affirmative action are by no means confined to the professoriate. Last year the editors of the *Columbia Law Review* adopted a new "diversity" program that will reserve special slots on the editorial board for individuals who qualify by virtue of their race, physical handicap, or sexual orientation. Law-review boards, of course, have customarily been meritocracies, with membership gained through outstanding academic achievement. With Columbia in the lead, one must suppose this will no longer be the rule even though, the New York *Post* commented, "No one has yet stepped forward . . . to explain why sexual orientation, for instance, would keep a student from performing well enough in law school to compete for the law review on the same basis as everyone else."

DIVERSITY and tolerance, evenhandedly applied, are estimable precepts. But that is not how they are construed in the academy today. Nor do the narrowing limits on free expression lead only to penalties for individuals who engage in "biased" talk or "hostile" behavior. They also leave little room for opinion that deviates from campus political norms or for grievances from unexpected directions. During Harvard's race-awareness week last spring, when a white student dared to complain that she had experienced "minority ethnocentrism" on campus—black and Hispanic students, it seems, often ignored her—she was given short shrift and no sympathy by the speaker (who had already suggested that Harvard and Dartmouth were "genocidal" institutions).

More commonly, however, it is rambunctious student newspapers and magazines that get into trouble with academic authorities for printing something that contravenes the conventional wisdom. Given the predominant campus climate, it is not surprising that these are often publications with a moderate or Right-of-Center orientation. Sometimes, clearly, they do mischievous, stupid, and offensive things, but for such things the degree of toleration in higher education seems to vary with the ideology of the perpetrator. (Acts of discrimination and oppression based on political views, it should be observed, are *not* among the categories proscribed in the new codes of behavior.) In addition to a much-reported sequence of events at Dartmouth, there have been recent efforts to censor or suppress student publications, and sometimes to discipline their staff members, at Brown, Berkeley, UCLA, Vassar, and California State University at Northridge.

The last of these prompted one of the most extraordinary media events of 1989, a joint press conference on May 16 featuring—no one could have made this up—former Attorney General Edwin Meese III and the director of the Washington office of the American Civil Liberties Union (ACLU), Morton Halperin. What brought them together was shared outrage over what Halperin termed the "double standard" on campus. "Our position," he reminded the attending journalists, "is that there is an absolute right to express views even if others find those views repugnant." He could cite numerous instances, he said, where campus authorities were making life difficult for outspoken conservative students, yet could find "no cases where universities discipline students for views or opinions on the Left, or for racist comments against non-minorities."

Meese, not surprisingly, concurred, as did James Taranto, the former Northridge student journalist whose lawsuit settlement afforded the specific occasion for the press conference. In 1987, Taranto, then news editor of his campus paper, had written a column faulting UCLA officials for suspending a student editor who had published a cartoon mocking affirmative action. Taranto reproduced the offending cartoon in the Northridge paper, whereupon its faculty adviser suspended *him* from his position for two weeks because he had printed "controversial" material without her permission. The ACLU agreed to represent him in a First Amendment suit—"We were as outraged as he was by the attempt to censor the press," Halperin recalled—and two years later a settlement was reached.

While we are accumulating ironies, let it be noted that the ACLU, the selfsame organization in which Michael Dukakis's "card-carrying membership" yielded George Bush considerable mileage in the 1988 election campaign, has been conspicuously more vigilant and outspoken about campus assaults on free expression in 1989 than has the Bush administration. The Secretary of Education, Lauro Cavazos (himself a former university president), has been silent. The White House has been mute. During an incident at Brown in May, when an art professor canceled a long-planned screening of the classic film, *Birth*

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* See "Revolution by Search Committee," the *New Criterion*, April 1989.

of a Nation, because the Providence branch of the NAACP had denounced it, the local ACLU affiliate was the only voice raised in dismay. "University officials," declared its executive director, "have now opened the door to numerous pressure groups who may wish to ban from the campus other films that they too deem 'offensive.'" Indeed. A colleague of mine recently revived a long-lapsed membership in the ACLU on the straightforward ground that no other national entity is resisting the spread of attitude-adjustment, censorship, and behavior codes in higher education.

ALL this would be worrisome enough even if the academy were doing well with respect to actual education for the minority students whose numbers it is so keen to increase and whose sensibilities campus administrators are so touchy about. But that is simply not the case.

Black and Hispanic students are less likely to enroll in college to begin with. This is not because admission offices turn them away—to the contrary—and not because too little student aid is available to help them defray the costs. (In any event, 80 percent of all students attend state institutions, in which tuitions average about $1,200 per year.) The largest reason more minority students do not matriculate is that so many attended wretched elementary and secondary schools in which they took the wrong courses, were poorly taught, had little expected of them, skipped class a lot, never learned much, and may well have dropped out.

Minority youngsters are not, of course, the only victims of our foundering public-education system, but they are the ones whose life prospects are most blighted by it, the ones for whom a solid basic education can make the biggest difference. Academic leaders know this full well, just as they understand that shoddy schools are major producers of ill-prepared college students. Yet for all its protestations and pieties, and notwithstanding its ardor for enhancing "diversity" on campus, the higher-education system has done essentially nothing to strengthen the schools that serve as its feeder institutions. It has not even taken the straightforward steps that are well within its purview—such as a complete overhaul of the education of teachers and principals. It has not reached down into the schools to begin the "admissions-counseling" process with disadvantaged fifth- and sixth-graders. And it most certainly has not made the tough decisions that over time could have a profound influence on the standards of the entire elementary-secondary system, such as announcing well in advance that beginning in, say, 1998 no student will be admitted to college who has not actually attained a specified level of knowledge and skills.

Such strong medicine is resisted with the argument that it must surely be bad for minority youngsters. That has been precisely the response to the NCAA's attempts to curb exploitation of minority athletes by requiring them to meet minimum academic standards in order to play intercollegiate sports or receive athletic scholarships. Georgetown's basketball coach staged a well-publicized one-man "strike" to protest this, claiming that the rules are discriminatory. The NCAA is expected to recant, heedless of the warning by the black tennis champion Arthur Ashe that "Black America stands to lose another generation of our young men unless they are helped to learn as well as play ball."

Getting more adequately prepared students inside the campus gates might also help to boost the egregiously low proportion of minority matriculants who end up with a degree. The college-dropout rate is a problem for everyone, and has been rising over the past decade, but it is manifestly worse for black and Hispanic students. According to the U.S. Department of Education, among the 1980 high-school graduates who immediately enrolled full-time in college, 50 percent of the Asians and 56 percent of the white students earned their bachelor's degrees within five-and-a-half years, but this was true for only 31 percent of black students, and for 33 percent of Hispanics. (For minority *athletes*, the dropout rate is higher still. "It's no secret," Ashe writes, "that 75 percent of black football and basketball players fail to graduate from college.")

One has got to conclude that if the colleges and universities put as much effort into high-quality instruction, vigorous advising, extra tutoring, summer sessions, and other supplementary academic services as they do to combating naughty campus behavior and unkind words—and maximizing fieldhouse revenues—they could make a big dent in these numbers. But, of course, it is easier to adopt a behavior code for students than to alter faculty-time allocations and administration priorities. Symbolic responses to problems are always quicker and less burdensome, at least in the short run, than hard work.

COMPLETING the degree, regrettably, does not end the matter, either. While possessing a college diploma will indisputably help a person get ahead in life even if he is still ignorant and intellectually inept, for a variety of public and private reasons it is desirable that college graduates also be well-educated. For minority graduates, it may be especially important that any plausible grounds for doubt be erased—from the minds of prospective employers, among others—as to the actual intellectual standards that their degrees represent.

Today, unfortunately, one cannot equate the acquisition of a bachelor's degree with possession of substantial knowledge and skills. When the Department of Education examined literacy levels among young adults in 1985, it accumulated data that enable us to glimpse the cognitive attainments of college graduates, as well as those with less schooling. The good news is that the former had generally attained a higher level than the latter. The bad news is that degree-holders did none too well.

Three scales were used, representing "prose literacy," "document literacy," and "quantitative literacy." At the highest level of the scales, white college graduates were to be found in proportions of 47, 52, and 48 percent, respectively—not really very laudable considering that the intellectual challenges to be mastered at those levels entailed such tasks as discerning the main point of a newspaper column, coping with a bus schedule, and calculating the change due and tip owed on a simple lunch. Among black college graduates, however, these levels were reached by only 18, 11, and 14 percent, respectively. (The number of Hispanic college graduates in the sample was too small for statistical reliability.)

The higher-education system, in short, is awarding a great many diplomas to individuals whose intellectual attainments are meager, even at the end of college, and for minority graduates this is happening so often that the academy may be faulted for massive deception. It is giving people degrees which imply that they have accomplished something they have not in fact achieved. Like driving a new car home from the dealer only to discover that it is a lemon, the owners of such degrees are likely one day to think themselves cheated rather than aided by the hypocrisy and erratic quality control of the academic enterprise. The taxpayers who now underwrite most of that enterprise are apt to feel much the same. Over time this can only diminish the support, the respect, and the allure of higher education itself, as well as further depleting its tiny residuum of moral capital.

Some academic leaders understand this. A few also have the gumption to say it. "The alternatives I see ahead for our higher-education system are reform from without or reform from within," Stephen J. Trachtenberg, the new president of George Washington University, predicted in a recent address to the American Association of University Administrators. "The present situation cannot hold because too many Americans are coming to regard it as incompatible with ethics, values, and moral imperatives."

Reform from within would surely be preferable. It nearly always is. But in 1989 the most prominent forms of spontaneous change on many of our high-status college and university campuses are apt instead to exacerbate the gravest problems the academy faces. Creating more complex and onerous rituals as they worship at the altar of "diversity," they concurrently provide the putative beneficiaries of their efforts so feeble an education as to suggest a cynical theology indeed. Meanwhile, in the realms of intellectual inquiry and expression, they permit ever less diversity, turning the campus (in the memorable phrase of civil-rights scholar Abigail Thernstrom) into "an island of repression in a sea of freedom."

Volume 1, Number 1 — January, 1989

synthesis
LAW AND POLICY IN HIGHER EDUCATION

Freedom of Expression and Racial Harassment on Campus

Welcome to Synthesis

This is the first issue of *Synthesis: Law and Policy in Higher Education*. You will find it to be a concise, reliable, and practical resource on *law and policy* in higher education. Our objective is to provide commentary and analysis that you can use to reduce the risk of litigation, and to fashion equitable policies and procedures that meet your educational objectives. We know of no other publication in higher education with such an exclusive and important focus.

We will address controversial issues. It will be our practice to state our views clearly, to solicit and publish contrary perspectives, and to remind you that no publication can replace consultation with your own attorney. Indeed, we hope to challenge you to think about and to discuss critical law and policy issues with counsel before a legal crisis arises.

Gary Pavela is the Editor of *Synthesis*. He is the Director of Judicial Programs at the University of Maryland at College Park, where he also teaches courses in administrative law and legal ethics. Mr. Pavela holds advanced degrees in history and in education from Wesleyan University in Connecticut, and a law degree from the University of Illinois. He is a member of the New York bar, has been a law clerk to a judge of the United States Court of Appeals for the Tenth Circuit, and was a Fellow at the University of Wisconsin Center for Behavioral Science and Law. He is the author of over a dozen articles and monographs related to law and education, and has drafted policies on student conduct, academic integrity, and psychiatric dismissals of students that are used by colleges and universities throughout the United States.

Tom Scheuermann is Assistant Editor of *Synthesis*. He serves on the staff of the Division of Student Affairs at the University of Maryland at College Park, where his prior experience includes several years as Rights and Responsibilities Coordinator for the Department of Resident Life. He holds an M.A. in student personnel from Ohio State University and is a 1985 graduate of the Catholic University of America School of Law, where he was research assistant to Professor William A. Kaplin, author of *The Law of Higher Education*. Mr. Scheuermann is a member of the Maryland and District of Columbia bars, has taught law and education at the University of Maryland at College Park, and is a frequent presenter at regional and national housing and student affairs conferences.

Synthesis will be a resource to help you make a difference on your campus. We look forward to a long and productive working relationship. ☐

In This Issue

The Justice Department received reports of thirty racial incidents at colleges and universities in 1987, many involving the use of racial epithets and offensive graffiti (Marquand, 1988). Such incidents have been a matter of particular concern for policy makers in higher education. One response at a number of institutions has been the development and publication of 'racial harassment' policies.

This issue of *Synthesis* will focus on the law and policy issues associated with the enforcement of prohibitions against racial harassment. First, in commentary **From the Editor**, we will identify several law and policy questions, and offer a perspective as to how those questions might be addressed. Then, in our **Caselaw Focus** section, we will introduce you to a number of pertinent cases, and what we perceive to be trends in the law. Additional commentary will follow, including, in this issue, commentary by Susan Komives and William Kaplin. Mr. Kaplin's remarks are set forth in the section **Law and Policy: Implications for Private Institutions**; that section, prepared by the editors or by various guest commentators, will be a regular feature of *Synthesis*.

Selections from racial harassment **Policy Statements** at the University of Michigan and the University of Massachusetts may be found on p. 5. Most issues of *Synthesis* will contain selections from policy statements at institutions of higher education throughout the United States and Canada. While we will not always agree with the statements that we cite, our choices will reflect policies which are frequently regarded as national models.

Another regular feature in *Synthesis* will be a detailed **Case Study**. You are encouraged to photocopy the case study question, solicit responses from appropriate staff members, and then distribute the **Case Study Commentary** for further discussion.

We want *Synthesis* to be a valuable resource both for policy makers and legal counsel. Accordingly, we will provide extensive case citations and references. If an asterisk* appears beside any case in the text, the case citation (see **References and Citations**) will also contain a reference to a detailed brief of the case, contained in either *The College Students and the Courts* or *The College Administrator and the Courts*.

Finally, each issue of *Synthesis* will end with a **Policy Maker Interview.** In the current issue, noted First Amendment scholar and University of Virginia President Robert M. O'Neil offers a number of thoughtful observations concerning freedom of expression and racial harassment on campus. ☐

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From the Editor:

Racism and American Values

Would it be considered a punishable act of racial harassment on your campus if a group of white students, engaging in otherwise lawful protest and speech making in front of the Afro-American Studies Center, carried signs bearing a grotesque and offensive caricature of Dr. Martin Luther King? If so, you should consider the case of *Street* v *New York*, decided by the United States Supreme Court in 1968.

In *Street*, the Supreme Court set aside the conviction of a black man who publicly burned an American flag on a street corner. Mr. Street, who was angered by the shooting of James Meredith, addressed a group of people who gathered to watch the flag burn, and said, "we don't need no damn flag." The Supreme Court did not declare that any statute against flag burning would be unconstitutional, but it did hold that Mr. Street could not be punished for the ideas he expressed. Those ideas, and the symbolic act he used to help convey them, had the potential to outrage many observers. Still, the Court concluded that

> any shock effect of [Mr. Street's] speech must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers (p. 592).

The *Street* case highlights the fact that provocative and offensive expression can be an effective means for any social, political or racial minority to capture the attention of those in power. There is no principled way of determining in advance which "favored" minorities will be allowed such freedom. Consequently, we accord the freedom to all, subject only to a few narrow exceptions, usually related to the state's interest in public order.

Racist speech and speech that is contemptuous of the Flag can be equally offensive to many Americans. In either case, the type of restraint shown by the Supreme Court in *Street* is instructive. Punishing racist speech can be an emotionally satisfying catharsis. There will also be occasions when it would be politically expedient as well. Still, those inclined to take that approach need to be reminded that they are opening a door through which others will surely follow. (See e.g. *Board of Education, Island Trees Union Free School* 1982: local school board attempted to remove or restrict access to a number of "anti-American," "anti-Christian" and "anti-Semitic" books in school libraries, including *Best Short Stories of Negro Writers*, edited by Langston Hughes; *Black Boy* by Richard Wright; and *Soul on Ice* by Eldridge Cleaver.) This was precisely the concern expressed by Justice Black when he wrote in *Communist Party* (1961) that "freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish" (dissenting opinion, p. 137).

> Freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.
>
> —Justice Hugo Black

The risk perceived by Justice Black might be worth taking if the United States, like Weimar Germany, were a fragile democracy confronted by the growing power of ruthless totalitarian demagogues. At present, however, censorship is not the most prudent or effective approach available to us. For example, in his classic study on *The Nature of Prejudice* (1954), Gordon Allport wrote that "(t)he remedy for prejudiced opinion is not suppression, but rather a free flowing counteraction by un-prejudiced opinion" (p. 469). Even in the immediate context of the use of racial epithets, Allport cited a study which found that the best response was to state, "preferably in a calm tone of voice," that such epithets were simply not compatible with American principles (p. 331).

Allport drew heavily upon Gunnar Myrdal's study of race relations in America, and Myrdal's conclusion that the "American dilemma" is the conflict between our patriotic enthusiasm for "American values" (as fervently expressed in the 1980's as in other times), and the reality of racism. That conflict should be exploited in order to challenge racist beliefs and acts. No one was more effective in this regard than Dr. Martin Luther King, who wrote in his "Letter From a Birmingham Jail" that:

> One day the South will know that when these disinherited children of God sat down at lunch counters, they were in reality standing up for what is best in the American dream and for the most sacred values in our Judeo-Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence (1963, p. 708).

Most educators appreciate that educational programming to combat racism is preferable to censorship and punishment. It will be important, however, not to forget the effectiveness of Dr. King's approach, or to engage in what Allport referred to as "heavy handed" reform efforts which exaggerate the "evil attributes" of whites in general or American society in particular (p. 430, 509). The best way to challenge racism is to appeal to our students' legitimate sense of pride in the best values of the American and Western traditions. One of those traditions, as described by Bernard Lewis (Dodge Professor Emeritus of Near Eastern Studies at Princeton), is an interest in and appreciation for other cultures and other peoples:

> Curiosity about other cultures, a willingness to learn their languages and study their ways, to appreciate and respect their achievements, all this again is peculiarly Western and relatively recent. The other great cultures of human history all have seen themselves as self-sufficient, and regarded the outsider–or even the subculture insider–with contempt, as barbarians, gentiles, untouchables, unbelievers, foreign devils, and the like... The West, in contrast, without constraint, developed an interest in other cultures, and made an effort to study them, to understand them and to enrich its own intellectual and cultural life in the process. (1988, p. 24)

The Western tradition described by Professor Lewis can provide students with a sense of accomplishment. Students committed to enhancing that tradition and "those great wells of democracy which were dug deep by the [American] founding fathers" can be effective fighters against racism.

If we have confidence in the power of our best values, and our ability to express them, then we can safely adopt the approach suggested by the Committee on Freedom of Expression at Yale University in 1975 (see quotation, p. 5). Essentially, while we have the right and the obligation to punish racist acts, our response to racist ideas should take the form of "suasion, example, and argument." Such was the wisdom of Thomas Jefferson: that, "[w]e have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors, and especially when the law stands ready to punish the first criminal act produced by the false reasonings" (cited in *Whitney*, 1926, p. 375, N.2).

— Gary Pavela

Caselaw Focus:

Punishing Racist Speech

A Supreme Court case which would appear to support the development of college or university racial harassment policies is *Chaplinsky* (1942). (See p. 7 for all references and case citations.) In that case, the Court held that a member of the Jehovah's Witness sect could be punished for calling a city marshall a "fascist" and a "racketeer," in violation of a New Hampshire statute. *Chaplinsky's* language was considered to be "fighting words" which, like obscenity, have "no essential part of any exposition of ideas" (p. 572).

Chaplinsky remains a valid precedent, but the Supreme Court has declined many opportunities to apply all of the reasoning in that case. For example, in *Cohen* (1971), the Court held that wearing a jacket bearing the words "Fuck the Draft" in a court house was a constitutionally protected form of expression. Likewise, in *Gooding* (1972) the Court overturned the conviction of a Vietnam war protester who told a police officer: "white son of a bitch, I'll kill you." The holdings in *Cohen* and *Gooding* suggest that *Chaplinsky* is limited to face to face encounters in which unusually provocative words have a direct tendency to provoke an immediate act of violence by a person to whom, individually, the words are addressed. Otherwise lawful expression among adults which is simply vulgar or offensive should not be considered "fighting words."

Another Supreme Court case frequently mentioned in support of campus racial harassment policies is *Beauharnais* (1952). There, the Court upheld an Illinois statute prohibiting "group libel." Beauharnais was charged with distributing leaflets which held "citizens of Illinois of the Negro race . . . to contempt, derision, or obloquy . . . ." (p. 252). Justice Frankfurter's majority opinion concluded that "[l]ibelous utterances," whether directed to individuals or to groups, were not "within the area of constitutionally protected speech" (p. 266).

The holding in *Beauharnais*, however, has had even less impact over the years than *Chaplinsky*, largely as a result of subsequent Supreme Court decisions limiting recovery for libel. Indeed, the late Judge J. Skelly Wright observed in *Anti-Defamation League* (1968) that "*Beauharnais* has been left more and more barren by subsequent First Amendment decisions, to the point where it is now doubtful that the decision still represents the views of the Court" (p. 174, n. 5). For example, in 1978, the Supreme Court refused to review a decision of the United States Court of Appeals for the Seventh Circuit in *Collin* (1978). In that case the circuit court struck down a number of ordinances designed to prevent a group of Nazi party members from marching through the predominantly Jewish village of Skokie, Illinois. Judge Wilber Pell observed that the "result we have reached is dictated by the fundamental proposition that if . . . civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises" (p. 1210).

The limited impact of *Chaplinsky* and *Beauharnais* is equally clear in the college and university environment. For example, the Supreme Court held in *Papish*,* 1973 that distribution of a newspaper depicting policemen raping the Statute of Liberty was protected by the First Amendment. Justice (now Chief Justice) Rehnquist dissented, citing *Chaplinsky*. Similarly, when the *Minnesota Daily* published a "Humor" issue "satirizing Christ . . . numerous ethnic groups, social customs . . . and liberal ideas" the United States Court of Appeals for the Eighth Circuit held that the university could not respond by changing the method of funding the newspaper, even though its contents were "occasionally blasphemous or vulgar" *Stanley*,* (1983) (p. 280, 283). Finally, in *Joyner*,* (1973), the United States Court of Appeals for the Fourth Circuit refused to allow the president of a predominantly black state university to withdraw financial support from an official student newspaper after the newspaper published an editorial criticizing the "growing white population on our campus;" and referred approvingly to H. Rap Brown's statement that "aggression is the order of the day" (p. 458).

In short, it would not be prudent to place heavy reliance upon a broad interpretation of *Chaplinsky* or *Beauharnais* in developing a campus racial harassment policy. Language which would allow the imposition of sanctions for "insensitive" or "intolerant" speech should be avoided, especially at public institutions. If a racial harassment policy is deemed necessary, it might be limited to threats or acts of racially motivated violence, and to a very narrow category of face to face "fighting words."

> Language which would allow the imposition of sanctions for ''insensitive'' or ''intolerant'' speech should be avoided, especially at public institutions.

Some final words of caution. A broad interpretation of *Chaplinsky* remains possible, and may be influenced by the outcome of the 1988 presidential election. Chief Justice Rehnquist seems willing to expand that case to cover vulgar and offensive expression, not just "fighting words." He joined a majority of the Court in applying *Chaplinsky* to the secondary school setting (*Bethel*, 1986, p. 683: "vulgar and offensive" speech which was "insulting to teenage girl students" may be sanctioned), and was also willing to apply *Chaplinsky* in a higher education case (see his dissent in *Papish*, supra). A number of Justices frequently regarded as "liberals" disagree with him in that regard (e.g. Justice Brennan, who is eighty-two years old, and Justice Marshall, who is eighty). More conservative appointments may tip the balance in favor of the full *Chaplinsky* rationale, which might then be expanded beyond the elementary and secondary school settings to colleges and universities as well. ☐

Susan Komives:

"Leaving Room to Grow"

Dr. Komives is Past President of the American College Personnel Association and was Vice President for Student Affairs on two private college campuses. She is now an Assistant Professor in College Student Personnel and a Faculty Associate in the Division of Student Affairs at the University of Maryland at College Park.

"But, Susan, (sob) ***I'm afraid to even ask a question because it may be racist that I don't already know the answer!"*** Talking with a crying freshman in the privacy of my Vice Presidential office, I painfully realized that in our zeal to take a values stand on the enrichment of diversity and clearly establish our expectations of student behaviors toward each other, we had closed off the opportunity for growth!

Following three painful racial and anti-semitic incidents in one week on my small, private campus, we mobilized wonderful responses: a letter from the President abhorring the inappropriate behaviors and clarifying our values, discussion groups in residence halls, a special faculty meeting on the key issues, a new task force to assess and recommend changes, judicial cases against the perpetrators, and ultimately a policy prohibiting behaviors which show an intolerance of others based on their gender, race, religion, sexual preference, etc. Many of these responses were indeed wonderful and rebuilt us as a strong community. We pulled together. We reaffirmed our common values.

Yet, we did not anticipate that in our zeal, we created a climate that was not only intolerant of intolerance, but which also inhibited candid dialogue among many students. The white freshman who came to see me was terrified of asking her black suitemate about her hair and about her music. She sincerely wanted to learn and to be close but now feared being perceived as ignorant and racist. We failed to recognize that students need room to grow while still upholding our common values. We forgot we were an educational institution that could teach these awarenesses instead of proclaiming them.

A carefully worded policy could have served us well: clarifying offensive behaviors and upholding commitment to our values while concurrently maintaining the openness needed to question, learn and grow into the enrichment of diversity. Modeled after our sexual harassment philosophies, policies and practices, we can stand against behaviors that victimize on the basis of race or ethnicity while leaving broad judgment in the interface with freedom of speech.

Policies provide teaching opportunities. Each fall we orient new students to the standards of our campus culture by explaining the important reasons behind such policies as academic honesty and alcohol. The inclusion of an "appreciation of diversity" policy provides a teachable moment, sets standards, can include language that allows room to grow into that appreciation and can support the broader freedom of speech issues important for scholarly inquiry. ☐

William Kaplin on

Law and Policy Implications for Private Institutions

The following interview with William A. Kaplin, Professor of Law at The Catholic University of America and author of "The Law of Higher Education" (2nd ed., 1985) was conducted by Tom Scheuermann on September 26, 1988.

A number of points addressed in this interview are covered in more depth in Professor Kaplin's book, in sections 1.4.2 (state action), 1.4.3 (other bases for legal rights), and 4.1.3 (contractual rights of students).

Private Institutions and Freedom of Expression

SYNTHESIS: Does the First Amendment of the United States Constitution apply to private institutions?

KAPLIN: Generally speaking, no. The argument for applying the Constitution to private institutions is called the 'state action' doctrine. There are Supreme Court cases, probably the most important being Rendell-Baker v. Kohn (1982), that make it clear that it would be rare that 'state action' would be found in the workings of a private institution. A 'nexus' test must be met — there must be a direct connection between the activity of government and the particular decision that the institution made. It's not enough that the government provides some monetary support.

SYNTHESIS: What if a private institution had in its catalog a statement to the effect that its students were guaranteed freedom of expression on campus. Could this be construed as a contract between the institution and the student?

KAPLIN: That's possible; catalog statements sometimes constitute the terms of a contractual relationship between college and student. Given the right language, an institution could actually apply the First Amendment to itself. Short of this, the private college could use the First Amendment to inform its policies and in doing so make use of the body of experience which has developed over the years in federal Constitutional law.

SYNTHESIS: A private institution which said nothing in its catalog about freedom of expression might be safe legally, but would that be the kind of approach that you would advise a private college or university to take?

KAPLIN: No. Protection of the institution from all kinds of legal claims is not necessarily the highest goal. Often, you have to take some risks in order to achieve higher goals such as freedom of expression within the university community. Administrators and their counsel could work together to strike the proper 'law-policy' balance in this situation.

SYNTHESIS: Should private universities and colleges take into account their state constitutions in developing rules on student freedom of expression?

KAPLIN: It depends on the state. Private institutions in New Jersey and Pennsylvania, for example, would need to be concerned, as State v. Schmid (1980) and Pennsylvania v. Tate (1981) could apply. Any private institution that is concerned about this area should check with its legal counsel to discuss whether its state constitution has provisions that are applicable. Even if the state constitution does not apply, the college may want to use it alongside the federal Constitution, as a guide to inform its disciplinary process.

SYNTHESIS: Should private colleges and universities have rules on racial/ethnic harassment that go beyond the prohibition of physical violence? What are the legal and policy issues involved?

KAPLIN: If I were to look at it mainly as a matter of policy, as I might do as a professor rather than a lawyer, I'd say yes, certainly—an institution should be concerned about that problem; they should have a means for dealing with it.

If the college is deciding whether or not to have a policy that is disciplinary in nature which could result in the suspension of students who have used racial epithets, that's a different issue. In order to have such a policy, the college should define a 'racial epithet,' and do so in a way that:

(1) students can understand what they're prohibited from doing;
(2) administrators can understand the criteria for making decisions in this area; and
(3) the institution over time can enforce its rules without doing so in a way that creates a 'chilling effect' on freedom of expression.

It would be extremely hard for an institution's policies to meet these three criteria, and (racial/ethnic harassment) policies should not rely primarily on disciplinary measures. A more comprehensive approach which includes education, counseling, and conciliation would be preferable. If disciplinary methods are employed as a part of such a policy, the rules should be narrow and specific, so as to meet the above criteria. ☐

From the Report of the Committee on Freedom of Expression at Yale University

January 8, 1975

"Shock, hurt, and anger are not consequences to be weighed lightly. No member of the community with a decent respect for others should use, or encourage others to use, slurs and epithets intended to discredit another's race, ethnic group, religion, or sex. It may sometimes be necessary in a university for civility and mutual respect to be superseded by the need to guarantee free expression. The values superseded are nevertheless important, and every member of the university community should consider them in exercising the fundamental right to free expression.

"We have considered the opposing argument that behavior which violates these social and ethical considerations should be made subject to formal sanctions, and the argument that such behavior entitles others to prevent speech they might regard as offensive. Our conviction that the central purpose of the university is to foster the free access of knowledge compels us to reject both of these arguments. They assert a right to prevent free expression. They rest upon the assumption that speech can be suppressed by anyone who deems it false or offensive . . . . They make the majority, or any willful minority, the arbiters of truth for all. If expression may be prevented, censored or punished, because of its content or because of the motives attributed to those who promote it, then it is no longer free. It will be subordinated to other values that we believe to be of lower priority in a university.

"The conclusions we draw, then, are these: even when some members of the university community fail to meet their social and ethical responsibilities, the paramount obligation of the university is to protect their right to free expression . . . . If the university's overriding commitment to free expression is to be sustained, secondary social and ethical responsibilities must be left to the informal process of suasion, example, and argument." ☐

Policy Statements

The University of Michigan—

"Because there is tension between freedom of speech, the right of individuals to be free from injury caused by discrimination, and the University's duty to protect the educational process, the enforcement procedures assume that it may be necessary to have varying standards depending upon the locus of the regulated conduct. Thus a distinction is drawn among public forums, educational and academic centers and housing units.

In dedicated public forums, such as the Diag and Regents' Plaza, as well as mass media such as the *Michigan Review* and the *Michigan Daily*, individuals are entitled to engage in the most wide-ranging freedom of speech.

In academic and educational centers where the University's educational mission is focused, such as classroom buildings, libraries, recreation or study centers, discriminatory conduct which materially impedes the educational process is an object of concern and may be proscribed.

* * * * * * *

The following types of behavior are discrimination or discriminatory harassment and are subject to discipline if they occur in educational or academic centers:

1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that:
    a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extracurricular activities or personal safety; or
    b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extracurricular activities or personal safety; or
    c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment, or participation in University sponsored extracurricular activities." ☐

The University of Massachusetts—

A Special Note on Respecting the Rights of Others in an Academic Community: ". . . the term 'harassment' is subject to a variety of interpretations. . . . This definition will be used by the Dean of Students and the Student Government Association Attorney General in bringing charges within the campus discipline system: Harassment or intimidation of another person, limiting another person's right to equal opportunity or otherwise denying another person equal treatment because of his or her race, sex or sexual preference, religion, age, handicap, national origin or ancestry is prohibited. The term 'harassment' is taken to include verbal and/or written invasion or violation of any individual's rights through graffiti, obscene telephone calls, or other means. Sanctions which may be imposed include suspension or expulsion from the University or such lesser sanction as may be appropriate to the nature of the act." ☐

Case Study

Mr. Gregory Anton is the leader of the Black Student Union (BSU), and the editor of the BSU newspaper on the campus of a private university. He had the privilege of introducing a prominent, but controversial, speaker at the BSU Forum, which was conducted in the student union auditorium. The auditorium was properly reserved for such a purpose, and was normally used as a place for public speech making.

The featured speaker at the BSU Forum engendered a hostile reaction from a number of students in the audience when he suggested that whites in general, and the Jewish community in particular, exploited blacks, and that "Jewish doctors are injecting black people with AIDS." Several students interrupted the speaker, engaged him in an angry shouting match, and persisted in disrupting his speech until they were ejected.

Mr. Anton was visibly upset by the disruption, and addressed the audience immediately after the featured speaker left the room. He stated that "we have a right to discriminate against those who have oppressed us" and asserted that "blacks and Jews can no longer live in peace on this campus." Thereafter, as Mr. Anton left the room, he engaged in a heated exchange with a Jewish student, who demanded an apology. In a manner which was uncharacteristic for him, Mr Anton called the Jewish student a "fascist Zionist pig," and pushed him aside.

Several members of the audience, their parents, and the student who was pushed by Mr. Anton arranged to meet with the university president. They described the events at the BSU Forum; complained that Mr. Anton and some of his friends could be overheard in their private conversations referring to Jewish students as "hymies;" and were outraged by Mr. Anton's most recent BSU newspaper editorial, that endorsed the statement that "the only good Zionist is a dead Zionist."

The mother of one of the complaining students, who is a prominent attorney, demanded that Mr. Anton be subject to immediate disciplinary action for pushing another student, and for "racial harassment." She reminded the college president, in reference to the latter offense, that Mr. Anton's remarks to the audience at the BSU Forum, his use of offensive epithets, and his inflammatory editorial constituted "fighting words" that would not be protected by the First Amendment, or by the college catalog statement guaranteeing "freedom of expression for students, faculty, and staff."

The college president immediately contacted the vice president for student affairs, who was in a local attorney's office giving a deposition in a five million dollar alcohol liability case. She asked him for a plan of action.

What should the vice president do? ☐

Commentary

☐ The First Amendment is not generally applied to private institutions. Still, private institutions usually have a commitment to freedom of expression. In the present case, that commitment is expressed in a catalog statement, and might be regarded as contractually binding. The vice president will need to consider the holding and the reasoning in analogous cases involving state action, as well as any relevant provisions in the state constitution.

☐ University regulations do prohibit physical violence. Consequently, Mr. Anton should be subject to disciplinary action if it is determined that he intentionally pushed another student. Furthermore, after Mr. Anton has been heard, and after the facts have been determined, any punishment imposed may reflect the ethnic slur which accompanied his act of violence. Generally, a stricter penalty should result if violence is racially or ethnically motivated. This approach was recently recommended by a panel appointed by Governor Cuomo in New York for bias-related criminal violations; see Barron (1988). In the tort law context, see *Fisher* (1967) (racial epithet that accompanied snatching plate from the hands of a customer may permit recovery for mental suffering).

☐ Any penalty imposed will need to balance the legitimate need for deterrence against an individualized consideration of Mr. Anton's motivations, his subsequent attitude toward the offense, and the likelihood that he could be induced to refrain from future acts of violence. Ideally, a penalty could be fashioned which would be relatively strict (i.e. a suspension, or restricted access to campus), but which would not preclude Mr. Anton from completing his education. It is entirely possible that Mr. Anton is not a committed advocate of racial or ethnic violence. He simply may be an inexperienced young man who was thrust into the middle of an event which was so volatile that anyone would have difficulty in controlling their emotions. Under these circumstances, a penalty entailing permanent dismissal from the institution may simply harden attitudes which, in the heat of the moment, represented little more than hyperbole. Unlike a federal judge, the vice president does not have life tenure. It will require an act of moral courage for him to make a "judicial" decision which will not be based upon a single-minded determination to make an example of Mr. Anton.

☐ Mr. Anton's speech to the audience should not be considered a form of racial or ethnic harassment, or an unlawful incitement to violence. His speech was not directed to any individual or specific group of individuals in the context of a direct, face-to-face encounter. See *Hess* (1973) (statement by antiwar demonstrator that "we'll take the fucking street later" was not punishable as "fighting words." Furthermore, "at worst," the statement "amounted to nothing more than advocacy of illegal action at some indefinite future time" p. 108); see *National Socialist White People's Party* (1973):

> the expression of racist and anti-semitic views in a public place and the right to assemble in a public place for the purpose of communicating and discussing racist and antisemitic views are protected activities and may not be circumscribed by the state, except where 'advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action,' p. 1015, citing *Brandenberg*, 1969.

See also Terminiello (1949), *Tinker* (1969), and *Healy** (1972). It will be important in this case to distinguish between general advocacy of racial discrimination in a speech, and a face to face encounter involving violence and an ethnic epithet. The former may be constitutionally protected; the latter is not. See Delgado, (1982, p. 177).

☐ Complaints about Mr. Anton's private references to "hymies" should not result in disciplinary action, unless Mr. Anton persists in using such language, and knows or has reason to know that unwilling listeners could not help but overhear his repeated ethnic slurs. Most campus disciplinary policies prohibit behavior of this nature on the ground that it is disruptive, especially if it occurs in residence hall corridors or other areas of campus that are not considered public forums. Nonetheless, if a special "racial harassment" policy is deemed necessary, it will be important to avoid using that policy, in conjunction with the disciplinary process, as a form of "thought control," or as a means to invade students' privacy. Such tactics are likely to produce a hostile counter-reaction, and unwilling compliance at best. Confrontation and moral dialogue, without the threat of formal punishment, are likely to be more effective over time. Finally, it would not be prudent to develop a racial harassment policy that would permit the imposition of penalties for a single incident involving the "mere utterance of an ethnic or racial epithet" *Rogers,* (1971), p. 238 cited in *Meritor,* (1986, p. 59). Again, informal efforts to prevent a recurrence would be the most effective means to bring about a reasoned change in behavior (see analogy to EEOC conciliation procedures in sexual harassment cases involving employee requests for injunctive relief, cited in *Meritor,* p. 77, Marshall concurring).

☐ Mr. Anton's newspaper editorial does not constitute a face to face encounter in which "fighting words" have been directed to a specific listener. If a private university chooses to adhere to the first amendment standards applicable to public institutions, it should take special care to avoid censoring student newspapers, or punishing students for the ideas expressed therein. See *Joyner** (1973), *Schiff** (1975), *Stanley** (1983), *Thonen** (1973), and *Trujillo* (1971).

☐ The vice president's responsibilities extend beyond the issue of determining what disciplinary sanctions might be imposed in Mr. Anton's case. He must endeavor to turn the present crisis into an opportunity for student and community development. He will want to reaffirm and explain the need for freedom of expression on campus, the limits upon such expression, the importance of civility, and the harm caused by racial or ethnic epithets (see Arkes, 1974; Delgado, 1982; Kretzmer, 1987; Lasson, 1985). It might also be desirable to meet privately with black and Jewish student groups on campus. Joint meetings between the leadership of both groups could then be arranged. While candid discussion of differences should be encouraged, a skillful facilitator will also help the participants focus upon a number of shared objectives. A plan of action might then be implemented to permit ongoing mutual cooperation to reach those objectives. (See, generally, Bayard Rustin, 1987 "[t]oday's struggle must be based on a non-racial program for economic justice that would facilitate the formation of coalitions . . ."). In any event, assuming that disagreements remain, it should be possible to find a structured way for the parties to "agree to disagree" in a more civil manner (see, e.g. Stevens, 1988, for an account of the advance planning associated with a visit by Louis Farrakhan to the University of Pennsylvania).

Finally, the vice president will need to anticipate that incidents involving alleged racial/ ethnic violence or harassment may be the focus of intense public scrutiny. Interested parties and the media are not incapable of exaggeration in such matters (see a comprehensive series of articles in the *Christian Science Monitor* by Robert Marguand, 1988: some charges of campus racism "were based on single-incident stories," several of which "were later found . . . after the initial press blitz . . . to be dubious." p. 1). Care should be taken to provide an honest account of pertinent facts, and to correct any false rumors. ☐

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An Interview With Robert M. O'Neil

Conducted by Gary Pavela, September 22, 1988.

Mr. O'Neil is a national authority on constitutional law and freedom of expression. He is the President of the University of Virginia, and George M. Kaufman Professor of Law at the University of Virginia Law School.

SYNTHESIS: Are there constitutionally permissible ways for public institutions of higher education to prohibit racist or sexist expression?

O'NEIL: In 1951 the United States Supreme Court upheld an Illinois law which did proscribe certain forms of racially inflammatory statements. The so-called group libel laws which were sustained at that time have largely been repealed, but the basic Supreme Court decision in thirty-seven years has not been overruled or even seriously qualified. Some people argue that with respect to statements deeply offensive to women, that an analogy to the exception made for obscenity might be applicable here. Still others would suggest that speech which is racially inflammatory is so close to that which creates a clear and present danger—for example the sub-category of "fighting words"—that an exception might be made. In short, there are fragments—straws on which one can fix—which may provide some guidance. But there is no direct or square precedent which justifies sanctions in this situation.

SYNTHESIS: Defining racist or sexist expression seems akin to defining obscenity. We may "know it when we see it" in some instances, such as the use of a demeaning racial epithet. But other expressions of racism can be more subtle, and might reflect ignorance rather than malice. How do we make principled distinctions?

O'NEIL: If a general exception were to be recognized from the constitutional safeguards, it would almost certainly require some kind of definition. The definition in this area is made more difficult by the subjectivity of a person's reaction. If, for example, one member of an ethnic or national minority refers to another person of that group in a way that might seem disparaging if used by an outsider, that may simply be part of a familiar, almost casual or joking relationship. So the context in which language is used becomes particularly significant and complicates the process of definition in this area much more than is the case in virtually any of the other areas in which exceptions to total free expression have been recognized.

SYNTHESIS: Why are racial epithets in the college and university environment any worse than all the other assorted insults that are readily available, such as calling someone a fool or a fascist, or worse?

O'NEIL: Language of this sort, which offends members of racial or ethnic groups, or women, or members of religious minorities is, as a matter of degree, more sensitive because it is more likely not only to create intense personal reaction; it is also more likely to create divisions between or among groups in a community which depends particularly on rational discourse, collaboration and cooperation among its members.

SYNTHESIS: In terms of the case law, what guidance do we have about restricting the campus press, or other forms of "pure" speech?

O'NEIL: I would argue the case law offers no basis for exceptions. There is, of course, a recent United States Supreme Court case which upholds the authority of high school administrators with respect to a school newspaper. Some have suggested that if the same elements were present in the context of a college newspaper, then similar deference would be paid to an administrative judgment to restrict or sanction its content. That analogy seems to be seriously flawed. The Supreme Court and others have differentiated quite sharply between the elementary/secondary school context. I expect they would do so if they were ever faced with a similar issue involving a college newspaper.

SYNTHESIS: Assume that a student at a public university decided to wear a Nazi arm band while enrolled in a class on the holocaust. How would you respond to such an incident?

O'NEIL: It would seem to me that unless a symbol or oral expression had actually been shown to have created disruption in the classroom and could not be restrained in any other way—for example by asking the student to sit in a different part of the room or by asking that the arm band be turned away from the rest of the class—only under those two conditions would any action of any kind, any administrative intervention, be warranted. Even then, it would have to be approached with great sensitivity. But the two preconditions, in my view, would be substantial and serious disruption, and the inefficacy of any lesser sanctions or alternatives.

SYNTHESIS: What if the threat of disruption came from the other students, who said that "If he wears that arm band again next Wednesday, we are going to throw him out of class."

O'NEIL: If the person who becomes the target of such comments is exercising his or her freedom of expression, then as Justice Black wrote several times in cases involving public disorder, it is the obligation of the authorities to restrain the would-be attackers or assailants and not to suppress the unpopular message.

SYNTHESIS: Must a college or university treat a racist or sexist banner outside a residence hall or fraternity house as being the equivalent of an arm band worn by a student?

O'NEIL: It seems to me that sanctions which would not be appropriate or even constitutionally valid as applied to individuals might well be applied to organizations with which the university or college has an ongoing relationship. Indeed, it may be that some sanction imposed on the organization would be sufficient, on one hand, to vindicate the concerns and interests of those who have been affected by this kind of communication, but at the same time would not directly impinge on the free expression of those who have conveyed it.

SYNTHESIS: Has the University of Virginia developed a racial harassment policy?

O'NEIL: Our approach has been to deal with specific issues as they have arisen. About two years ago, there was a swastika chiseled into the bulletin board of the university's Upward Bound office. At that time, I not only asked the university police to take all possible means to discover the persons responsible, but also condemned and deplored actions of this kind and made clear that the university stood ready to prevent and in this case to punish. This act was not pure speech in any sense—this was physical defacement of a bulletin board that was itself a necessary medium of communication. My statement is as close to a policy as we have adopted.

SYNTHESIS: I take it then that you would not impose sanctions against an individual who made what was interpreted to be a racist speech in a public forum on campus.

O'NEIL: Not without violence or disruption or threat of it—even perhaps if someone had left a [racist] note pinned to the bulletin board. That, it seems to me, is quite different than taking a sharp instrument and physically defacing or destroying the bulletin board, which is what was done.

SYNTHESIS: And your response would be the same if a member of a minority group read that note and was offended by it?

O'Neil: That is correct. The reaction might be similar. The distinction, however, is in the means by which the affront or insult is conveyed or perpetrated. That distinction seems to me crucial throughout this area.

FREEDOM OF EXPRESSION UNDER THE FIRST AMENDMENT AND RACIAL HARASSMENT ON CAMPUS

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I. INTRODUCTION

One of the most difficult questions facing college and university presidents today is how to reconcile the first amendment right to free speech and expression with occurences of race discrimination on their campuses. In an effort to prevent racial harassment and retain minorities on campus, many presidents have instituted racial harassment policies designed to prohibit such behavior. Because these policies restrict free speech and expression, their legal status under the first amendment is unsettled. The right to freedom of speech must be weighed against the right of the victim of racist speech to enjoy a college experience free from such personally degrading harassment.

This outline reviews the restrictions on the first amendment right to free speech that have been recognized by the Supreme Court. It then considers which of the recognized restrictions would support the institution of college and university racial harassment policies, and examines the ability of colleges and universities to restrict and sanction racially offensive behavior on the theory that such conduct lacks expressive content, and like obscenity, has no socially redeeming value. Finally, it suggests guidelines for drafting effective campus racial harassment policies that will withstand first amendment scrutiny.

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II. THE FIRST AMENDMENT

The right to freedom of speech is guaranteed and protected by the first amendment to the Constitution. U.S. Const. amend. I. Although the Supreme Court's recent decision in _Texas v. Johnson_, 109 S. Ct. 2533 (1989), suggests that the Court is currently taking a strong position to protect the right to free speech, the right is not absolute.

A. _General Limitations on First Amendment Protection_

The Supreme Court has held that the protection of speech under the first amendment is subject to the following limitations:

1. _Fighting Words_

Threatening, profane and obscene language may be restricted under the "fighting words" doctrine. _See_ _Chaplinsky v. New Hampshire_, 315 U.S. 568 (1942).

a. The Supreme Court has defined "fighting" words to be those words, "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." _Id_. at 572.

b. The test for determining whether words are "fighting" words, is whether the average individual would perceive them to be words likely to cause the average addressee to fight. _See_ _Cohen v. California_, 403 U.S. 15 (1971).

c. In addition, the "fighting words" must be directed at a specific hearer. For example, the Supreme Court struck down the conviction, under a breach of the peace statute, of a man who wore a "F--- the Draft" jacket in a local courthouse, finding that the expression was outside the "fighting words" exception because it was not directed at a particular hearer; therefore, no individual could properly view the expression as a direct personal insult. See id. Similarly, in Gooding v. Wilson, 405 U.S. 518, 528 (1972), the court upheld the lower court's reversal of the conviction of a Vietnam war protester who told a police officer: "[w]hite son of a b----, I'll kill you." Id. at 520 n. 1. The holdings in these cases seem to limit "fighting words" to face to face encounters in which exceptionally provocative words would reasonably provoke an immediate act of physical violence by the person or persons to whom the words are addressed.

d. The Court has specifically stated that, "[r]esort to epithets or personal abuse is not . . . safeguarded by the Constitution." Chaplinsky, 315 U.S. at 572 (citing Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940).

e. Further "[l]ibelous utterances," whether directed to an individual or to a group, are not within the area of constitutionally protected speech. Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

2. Obscene Speech

Speech which is obscene is not protected by the First Amendment. See Miller v. California, 413 U.S. 15 (1973).

3. Clear and Present Danger of Incitement to Violence

Speech that presents a clear and present danger of bringing about substantial harm or evil that the government has the power to prevent is not protected by the First Amendment. See Brandenburg v. Ohio, 395 U.S. 444 (1969).

a. To meet this standard, speech or advocacy must be "directed to inciting or producing imminent lawless action" and be "likely to incite or produce such action." 395 U.S. at 446.

b. Speech may not be restricted merely because it makes peoply angry. The Court has applied the clear and present danger test to find that a speech denouncing the activities of political and racial groups within an audience did not rise to the level of presenting a clear and present danger even though one of the major purposes of the speech was to stir people to anger through creating unrest and dissatisfaction. See Terminello v. Chicago, 337 U.S. 1 (1949). In contrast, however, intimidating statements coupled with overt acts are not protected, and may be enjoined to permit individuals to pursue their desired occupations free of racial animus. See Vietnamese Fishermen's Ass'n v. Knights of the K.K.K., 518 F. Supp. 993 (S.D. Tex. 1981); see also Lynch v. State, 2 Md. App. 546, 236 A.2d 45 (1967); cert. denied, 393 U.S. 915 (1968). In Lynch, the court found racial epithets to be unprotected speech. Id. at 54.

4. Defamation

The core of the doctrine in this area was summarized in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (footnote omitted): "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."

B. Limitations on First Amendment Protection in the School Environment

The Supreme Court has held that additional restrictions may be placed on speech in public schools because of the "special circumstances" of the school environment.

1. Public Secondary School Cases

The Supreme Court has recognized significant authority among secondary school officials to restrict speech in the schools.

a. The Court distinguished free speech in the public secondary school environment from free speech in the general public arena, emphasizing the need for affirming the authority of states and school officials to prescribe and control conduct in schools. See Tinker v. Des Moines School District, 393 U.S. 503, 509 (1969). However, in Tinker, the Court held that the school improperly prohibited students from wearing black armbands to protest the Vietnam War because the expression did not "intrude[] upon the work of the schools or the rights of other students." Id. at 508. The Court found that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Id. Rather, speech must "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or infringe upon the rights of others before it may be legitimately restricted. Id. at 509 (citation omitted).

b. More recently, the Court has emphasized the "special characteristics" of a public high school and stated that since public high schools are charged with the task of inculcating students with the fundamental values necessary for a democratic society, "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." Bethel School District v. Fraser, 478 U.S. 675, 683 (1986). In Bethel, the Court ruled in favor of high school officials who imposed sanctions upon a student for using "lewd and offensive" speech when nominating a classmate for office.

c. The Court continues to recognize the "special characteristics" of the secondary school environment and recently reaffirmed and enhanced educators' authority over school-sponsored activities in order to ensure that "participants learn whatever lessons the activity is designed to teach." Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 271 (1988). In Hazelwood, the Court ruled in favor of a school official who edited out of the high school newspaper articles discussing teenage pregnancy and divorce because the articles made apparent the identities of the individual students who were the subjects of the articles. Id. at 276.

2. College and University Cases

The Court also has recognized the need for colleges and universities to control student conduct within their borders, but has interpreted their authority much more narrowly than that of secondary school officials.

a. The legal relationship between a university and its students is essentially contractual. Cloud v. Trustees of Boston Univ., 720 F.2d 721, 724 (1st Cir. 1983); Slaughter v. Brigham Young Univ., 514 F.2d 622, 626 (10th Cir.), cert. denied, 423 U.S. 898 (1975). Universities have broad discretion to promulgate reasonable rules of conduct and require compliance with them. Coveney v. College of Holy Cross, 338 Mass. 16, 19, 445 N.E.2d 136, 139 (1983). In the college and university environment, the Court has stated that speech or associational activities may be restricted when they "infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." Healy v. James, 408 U.S. 169, 189 (1972). Sanction may be withheld from groups with a knowing affiliation with an organization possessing unlawful aims and goals and a specific intent to further those illegal aims. See id. The critical line is that between mere advocacy of beliefs and advocacy directed toward producing imminent lawless action. Id. at 188.

Nevertheless, in Healy, the Court ruled in favor of a student political group which had been denied official recognition by the college because the national political organization was reputed to endorse disruption and violence. The Court found that the student political group was not "directed to inciting or producing imminent lawless action" nor "likely to incite or produce such action." Id. at 188 (citing Brandenburg v. Ohio, 355 U.S. 444, 447 (1969).

b. The Court continues to endorse the standard stated in Healy. In short, a university has the right "to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education." Widmar v. Vincent, 454 U.S. 263, 277 (1981). However, in Widmar, the Court once again found that the state university improperly restricted a student group. Once the university creates an open forum for student groups, any attempt by college or university officials to limit its use by student groups on the basis of the content of their speech must meet the constitutional standard. To pass constitutional muster, the regulation of speech must be narrowly tailored and necessary to achieve a compelling state interest. Id.

c. In contrast to the content restriction upheld by the Supreme Court in the secondary school environment in *Bethel*, the Court has specifically stated that on a state university campus the mere dissemination of ideas -- no matter how offensive to good taste - may not be shut off in the name of "conventions of decency" alone. *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667, 670 (1973). In *Papish*, a graduate student was expelled for distributing a newspaper on campus with the headline "Mother F----- Aquitted." The Court found that the dismissal was based on the content of the speech rather than the time, place or manner of its distribution, and therefore the action did not fall within the regulatory power of the school officials in the college environment. *Id*. at 671. The Court recently reaffirmed this view in *Texas v. Johnson*, 109 S. Ct. 2533 (1989). In holding unconstitutional the petitioner's conviction under a state statute that banned flag burning, the Court stated: "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 109 S. Ct. at 2544. If the institution seeks to regulate the content of speech, it must show a compelling state interest before such regulation will be upheld. 109 S. Ct. at 2538.

III. RESTRICTING RACIAL HARASSMENT ON COLLEGE AND UNIVERSITY CAMPUSES

A. *Limiting Racially Offensive Speech Under the Fighting Words Doctrine*

The Supreme Court's first amendment decisions suggest that policies in colleges and universities which narrowly proscribe racial slurs directed at a particular individual or audience may be upheld under the fighting words doctrine. However, a policy which would allow the imposition of sanctions for persuasive, insensitive or intolerant speech, even if it is intended to offend other persons, should be avoided. See Texas v. Johnson, 109 S. Ct. at 2538; see also Stanley v. Magrath, 719 F.2d 279 (8th Cir. 1983); Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied 439 U.S. 916 (1978).

1. For example, Stanford University's proposed policy which seeks to prohibit face-to-face confrontations involving racial, homophobic, religious or sexist slurs toward a particular individual or group would likely be upheld in the courts. Stanford's proposed policy makes "intent to hurt or harass an essential component of any offense and requires that the remarks be 'directly addressed' to the people involved and states that the offense 'must be expressed in words, pictures, or symbols that are commonly understood to convey, in a direct and visceral way, hatred or contempt for human beings of the sex, race, color, handicap, religion, sexual orientation or national and ethnic origin in question.'" NY Times, April 25, 1989, § A at 1.

2. Broader restrictions on students' speech, such as the University of Michigan's policy, have not been upheld. See Doe v. University of Michigan, No. 89-71683 (E.D. Mich. Sept. 22, 1989). Michigan's anti-discrimination policy empowered the school to punish students who were guilty of "discriminatory" conduct in university housing, classroom buildings and libraries. Behavior which the policy deemed discriminatory was: any act that "stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status." Id. at 7. Thus the policy did not require a face-to-face confrontation, did not require an intent to discriminate or harass, and did not require the act to be generally perceived as stigmatizing.

3. Accordingly, incidents such as displaying a racist caricature of Beethoven, or holding a mock slave auction in blackface, which are certainly racially offensive and insensitive, probably could not be restricted under the "fighting words" doctrine unless the actions were combined with specific threats or acts of racially motivated violence and were directed toward a particular individual or an identifiable group of individuals.

B. Limiting Speech Under the "Special Characteristics" Doctrine

In addition to the "fighting words" doctrine, it appears that the "special characteristics" of the learning environment may be a basis for the creation of a racial harassment policy at a college or university. The usefulness of this theory, as well as its legality, depends not only on the nature of the speech involved, but also on the environment in which the speech occurs. See Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989); Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling, 17 Harv. C.R.-C.L. L. Rev. 133 (1982).

1. Guest Speakers on State College & University Campuses

a. Where the state college or university has opened up a public forum for guest lecturers, the ability to limit racially offensive speech is severely restricted. "[S]tate colleges and universities are not enclaves immune from the sweep of the first amendment." Healy, 408 U.S. at 180. If the university provides a forum, it must do so on a content-neutral basis. Widmar, 454 U.S. at 277. Thus, if a campus has been open to all lecturers, a particular lecturer cannot be refused. See Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir. 1969); Snyder v. University of Illinois, 286 F. Supp. 927 (N.D. Ill. 1968). The university cannot restrict speakers based on the content of their speeches unless it is necessary to achieve a compelling state interest and the restriction is narrowly tailored to attain that end.

b. However, the administration retains the ability to limit speech if it would substantially interfere with the discipline of the campus. For example, in Pickings v. Bruce, 430 F.2d 595 (8th Cir. 1970) members of a student political group were suspended from a college for sponsoring speakers the college had banned as controversial. The speakers were outspoken, militant racists. The court stated that if school administrators "could reasonably forecast that [the speaker's] presence on-campus would substantially interfere with the work of school, the rights of students and the maintenance of appropriate discipline," id. at 599, their speech could be prohibited. However, in Pickings, the court found that although the speaker's presence might heighten the racial tensions that already existed at the college and might even provoke action among some students, the speaker's presence would not cause tensions "to explode into aggressive, disruptive action or even group demonstrations." Id. at 599.

2. Student Organizations on State College and University Campuses

a. Student organizations whose philosophies and/or speech may be racially offensive to others also enjoy the protection of the first amendment. Universities must recognize such groups and allow them the opportunity to voice their views as do other campus groups. Such political speech would not "materially and substantially disrupt the work and discipline of the school." Healy, 408 U.S. at 189 (citing Tinker, 393 U.S. at 513). Nor does such speech appear to interfere with the rights of others to obtain an education.

b. Even if granting recognition to a group viewed as particularly racially biased, led to student protest, boycotting classes or a student sit-in, the disruption would stem from the reaction of students to the speech (or the group's associational rights). Under Healy, the justification for speech and associational rights must arise out of the physical impact of the speech-related activity and not from the content of the activities. "People may extol the virtues of arson or even cannibalism. They simply may not commit the acts." Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 368 (8th Cir. 1988).

3. Racially Offensive Speech of Individual Actors

Unlike the expressions of guest speakers and student organizations, incidents of individual or small group racism arguably occur outside the realm of political speech. In addition to restricting such racial epithets and slurs under the "fighting words" doctrine, such racially offensive speech may be restricted based on the "special characteristics" of the state, college or university environment because the speech involves an "invasion of the rights of others," Tinker, 393 U.S. at 513, or "substantially interfere[s] with the opportunity of other students to obtain an education." Healy, 408 U.S. at 189. See also Matsuda, supra, at 10.

a. School officials might argue that as they are seeking to provide a particular environment for the nurturing and education of all of its student members, behavior (actions or speech) which is incompatible with this goal must be restricted.

Administrators could legitimately find that racially offensive speech or expression undermines the state college or university's "basic educational mission" and substantially interferes with its ability to provide the academic environment necessary for a quality education.

b. Racially offensive expressions also interfere with the educational opportunities of minority students because of the negative psychological effects of attending school in an environment where racist expressions occur with impunity. See generally, Delgado, supra, at 10. Students who are the target of such treatment must divert time and energy away from their studies to seek support, heal themselves and organize, to bring to the administration's attention the need for some type of redress for the incident, or at least, the need for cultural awareness programming. While the aftermath of such an incident may yield longstanding benefits, the activism it requires on the part of the affected student (or group) interferes with the pursuit of his/her academic goals.

IV. GUIDELINES FOR DRAFTING RACIAL HARASSMENT POLICY

A. First Amendment Considerations

A racial harassment policy that will pass constitutional scrutiny must be drafted narrowly and precisely.

1. It must specifically define the types of speech and/or expression that are deemed to be racially offensive and restricted, and these should include threats or acts of racially motivated violence in addition to a narrow category of face to face "fighting words."

2. It should be limited to restricting language that is intentionally hurtful and recognized by society to be inappropriate.

3. It should require that, in order to be prohibited, the speech be directed face-to-face at a particular individual or identifiable group of individuals who have traditionally been the subjects of discrimination. (Notably, in her article, Matsuda compares such victims with those who, against their will, are required to tolerate flag desecration as part of the price of freedom. The victims of racist speech are the traditional, longstanding victims of discrimination. "In the case of flag-burning, we force patriots, veterans and flag-lovers of all races to tolerate flag desecration as part of the price of freedom." 87 Mich. L. Rev. at 2376.)

4. It should articulate the conflict between racially harassing speech and the school's educational mission.

B. Other Considerations

In addition to drafting a policy that will withstand scrutiny under the first amendment, the effectiveness of the policy depends on other provisions, including:

1. A procedure for adjudicating allegations that the policy was violated.

2. Sanctions against policy violators.

3. Measures to educate students and faculty of the policy to prevent racial harassment from occurring in the first place.

NATIONAL INSTITUTE AGAINST PREJUDICE & VIOLENCE

WHEN FREE SPEECH BECOMES HARASSMENT

Developing Effective Campus Policies

by David S. Tatel

MARCH 1990 **SPECIAL REPORT**

The following is the text of remarks delivered by attorney David S. Tatel at the October 10-11, 1989, conference entitled, "The President's Role in Creating a Healthy Campus Racial and Ethnic Climate." The conference was co-sponsored by the National Institute Against Prejudice and Violence, the United States Department of Justice Community Relations Service, the American Association of State Colleges and Universities, and the University of Maryland Baltimore County. Mr. Tatel , former director of the Department of Health, Education and Welfare's Office for Civil Rights, is a partner in the Washington, D.C. law firm of Hogan & Hartson and head of the firm's education group.

When Joan Weiss asked me to speak here today, I planned to describe the extent to which the First Amendment to the Constitution imposes limits on the ability of a public college or university to deal with racially offensive and demeaning speech. The more I thought about the issues, however, the more it seemed to me that approach would not be particularly helpful. Although I have my own views on that important subject, the truth is that the precise scope of the First Amendment and its applicability to offensive and demeaning speech on campus is unsettled. There are as many views on the subject as there are people who have addressed it. In the end, we may not know the answer until the Supreme Court addresses this difficult issue.

For these reasons, I thought it would be more helpful to suggest how colleges and universities can approach this difficult and growing problem of racial harassment on campus in a way that avoids a First Amendment controversy altogether, or at least minimizes one if it occurs. Whether a university's view of the First Amendment is broad or narrow, a strategy designed to minimize conflict with it makes sense for several reasons. For one thing, academic freedom is itself protected by the First Amendment; the university ought to be the last institution in society that imposes limits on it. This is particularly true when those limits are imposed in the name of equal educational opportunity, since the civil rights movement has itself been conducted under the protective umbrella of the First Amendment.

Finally, clashes with the First Amendment are quite likely to result in litigation which will be both divisive and, particularly if the institution loses, expensive.

Before summarizing my suggestions for avoiding a conflict with the First Amendment, I want to make three points. First, the First Amendment applies only to public institutions. Some private institutions, however, are subject to similar principles of freedom of expression either because state law contains such guarantees or because they have incorporated such guarantees in their catalogs and publications.

Second, although I will be referring to racial harassment throughout this talk, my comments are equally applicable to harassment based on sex, ethnicity, sexual orientation or disability.

Finally, and most important, my suggestions that the First Amendment imposes limits on the power of public universities to punish offensive and demeaning speech should not be interpreted as an indication that I do not believe that the problem is serious. To the contrary, my own view is that racial harassment is a growing problem on our campuses that is causing grave and serious harm to minority students. It is a problem that demands the immediate attention of college presidents and boards of trustees. At the same time, it must be approached with a clear understanding of the First Amendment, for as Justice Black has said: "I do not believe that it can be too often repeated that the freedoms...guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish."

I. Assess the Need for a Policy

My first suggestion is that before dashing off a racial harassment policy, a university should ask itself whether it really needs one. The reason for asking this question is that federal law — and in many parts of the country, state law — punish racially–motivated interfer-

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ence with constitutional and statutory rights, including the right to attend public universities or private universities that receive federal funds. These laws carry both criminal and civil sanctions. Several states have laws that prohibit any form of racial harassment, and in other states, victims of racial harassment can recover damages for emotional injury.

These statutes are, of course, quite narrow. They prohibit only the most egregious forms of racial harassment and intimidation. But depending upon the particular circumstances on campus, a university might find that it can satisfy its needs by relying on existing criminal and civil law. For this reason, before a university drafts a racial harassment policy, it should examine the key federal laws carefully and determine whether relevant state law provides additional criminal and civil sanctions. If it does not, it may want to consider whether seeking state legislation would solve the problem on its campus.

The advantages of this course of action are two-fold. First, it will keep the university out of the business of regulating speech and thus avoid any conflict between university policy and the First Amendment altogether. Second, I cannot think of a more effective way to signal to the university community that racial harassment is unacceptable than by treating it as a criminal offense.

There are, of course, disadvantages to this approach. Criminal and civil law may not be sufficiently broad to cover the types of behavior that are occurring on campus. Also, some believe that universities ought to regulate themselves, and bringing law enforcement officers on campus is inconsistent with that autonomy.

I do not know whether the advantages of this course of action outweigh the disadvantages on any particular campus. That is a question each university will have to decide for itself. My only point is that this is a decision a university ought to make before it writes its own racial harassment policy that could precipitate a serious conflict with the First Amendment.

II. Ensure That the Policy Is Both Narrow and Clear

Universities that believe they need a racial harassment policy should make sure their policy is both narrow and clear. Let me first address the question of narrowness.

Before a university begins to write a racial harassment policy, it needs to understand certain basic First Amendment principles. The most important is that the First Amendment prohibits public entities from punishing speech, except for certain very narrowly limited classes of speech such as obscenity, libel, slander, and what are known as "fighting words" — those that are directed at an individual and are likely to cause the average person to retaliate and precipitate a breach of the peace. Courts have allowed public entities to regulate the "time, place and manner" of speech, provided the limitations are narrow and content neutral.

In recent years, the Supreme Court has carved out an additional exception to the First Amendment that gives elementary and secondary schools broad discretion to regulate student expressive activities that are curriculum-related. This exception, however, does not apply to colleges and universities which the Supreme Court has repeatedly held are not "immune from the sweep of the First Amendment."

The Supreme Court's latest First Amendment decision — the 1989 flag burning case — is worth reading because, although it was controversial, Justice Brennan's majority opinion was quite traditional in its application of First Amendment doctrine and illustrates the importance of ensuring that racial harassment policies are as narrow as possible. The Court ruled that expressive conduct — burning an American flag — is entitled to the same First Amendment protection as is accorded to ordinary speech, and that it cannot be punished merely because the state disagrees with the views that are expressed. The decision is particularly worth reading because, in a comment directly related to the subject of this conference, Justice Brennan said that society cannot prohibit the expression of an idea or punish it merely because society finds the idea to be offensive or disagreeable. The First Amendment, he said, does not "guarantee that other concepts virtually sacred to our Nation as a whole — such as the principle that discrimination on the basis of race is odious and destructive — will go unquestioned in the marketplace of ideas."

Notwithstanding the Supreme Court's very narrow and very consistent interpretation of the First Amendment, the increased level of racial harassment on campus has led some colleges and universities to argue for more authority to regulate offensive speech. The primary argument is that the university community is different from society as a whole, that it is an academic, collegial institution, and that its primary responsibility is to protect the integrity of the academic process. Because of this, it is argued, universities can punish offensive and demeaning speech that interferes with the integrity of the academic process even though that speech might be protected by the First Amendment outside the university community.

A second argument for giving universities greater authority to regulate speech is that universities have a legitimate interest in promoting racial diversity on campus and a responsibility to maintain a harmonious community and protect minority students from discrimination on the basis of race. That responsibility, it is argued, also gives the institution authority to punish racist speech that might otherwise be protected by the First Amendment.

A third argument is that racially harassing speech is so damaging to minority students that, like obscenity, it can be prohibited outright. This argument would apply on or off campus.

Many well–intentioned people believe that these arguments have merit. Indeed, some universities have used these arguments to justify policies that penalize speech that interferes with "the learning environment." Others strongly disagree with these arguments and believe that the courts will not accept them as a basis for creating an additional exception to the First Amendment. As I said at the outset, I do not intend to try to resolve this debate. The important point is that the courts have not yet accepted any of these arguments. This means that a university that relies on them as a basis for its racial harassment policy is venturing into unchartered waters and running the risk that its policy will be challenged in court. Depending on the particular circumstances on campus, a university may be prepared to run that risk, but before it does, it at least ought to examine whether a narrow approach might satisfy its needs.

I already mentioned using existing federal and state law. If those do not satisfy a university's needs, the institution should consider the possibility of basing a racial harassment policy on the well–accepted "fighting words" exception to the First Amendment. This exception would allow a university to punish offensive or demeaning speech that is likely to cause retaliation or breach of the peace.

If that approach is too narrow, a university should consider the possibility of prohibiting offensive or demeaning speech that is aimed at an individual and that is intended to cause direct, immediate, and serious injury, *i.e.*, one–on–one racial epithets. Although the courts have generally ruled that even racial epithets are protected by the First Amendment, at least to the extent that they do not amount to "fighting words," my own view is that a narrowly drafted policy that prohibits one-on-one racial epithets might well survive constitutional scrutiny in the context of the college campus. Racial epithets advance none of the purposes of the First Amendment, they cause serious injury, and they can disrupt the learning environment. The courts might accept such a narrowly drafted racial harassment policy as a rational compromise of a difficult problem, particularly if the university follows the other suggestions that I am going to make in just a moment.

I want to emphasize that I am not saying that a racial harassment policy that penalizes only one–on–one racial epithets *will* survive constitutional challenge. I am saying only that it has a good chance of doing so, and that it certainly has a better chance than the broader regulations that many universities now are adopting. The point of all of this, of course, is that the narrower a university's policy, the closer the policy sticks to punishing only one-on-one racial epithets, the less likely the university will be sued and the more likely it will win if it is.

In addition to drawing a racial harassment policy narrowly, a university also should be sure that the policy is as clear as possible. The reason for this is that regardless of how narrow the university intends its policy to be, if the language is not clear and if it could be interpreted to punish protected as well as unprotected speech, the courts will likely invalidate it.

For this reason, the language of the policy should be crystal clear. All written and oral interpretations and explanations of the policy should be equally clear. And finally, a university should make sure that the policy is applied consistently and only to unprotected activities. The overall message a university should send to a reviewing court is that the campus clearly understands the policy and that it can be applied only to speech that is not protected by the First Amendment.

Before turning to my third suggestion, I want to emphasize that although the First Amendment may limit a university's power to punish certain kinds of speech, it in no way limits the university's ability to condemn racial harassment in the strongest possible terms. Nothing in the First Amendment prohibits the university from harnessing all of its educational and communicative resources in the battle against racial harassment.

III. Identify the Types of Speech to be Penalized

My next suggestion derives from the English teacher's old adage that one cannot write clearly about a subject that one does not clearly understand. This principle applies equally to the drafting of racial harassment policies: before a university writes a policy, it is important for it to focus on precisely what it wants to prohibit.

Some universities have approached the problem the other way around: they begin by writing the policy before they completely understand the types of speech they want to prohibit. As a consequence, the language is usually overbroad and vague, and there is little consensus on campus as to its meaning.

A better approach is to focus first on the types of speech a university wants to penalize. Once it reaches agreement on this, it will be relatively easy to write a policy that punishes only the speech it wants to discourage. Not only is this likely to result in a policy that is narrow and clear, but it will demonstrate to a reviewing court that the university approached the issue carefully and with sensitivity to the limits of the First Amendment.

IV. Involve the Entire Campus Community

Do not write the policy in the administration building. Instead, let the policy evolve from a process that includes all elements of the university community.

For example, an institution should consider establishing a committee consisting of faculty, administrators, staff and students, and directing it to hold two sets of hearings. The first should be a fact-finding hearing. All interested organizations and individuals should be invited to testify on the extent of racial harassment on campus. Include testimony from constitutional scholars on the limits of the First Amendment.

The committee should make findings on the basis of these hearings and summarize them in a public report. The report should include the committee's findings regarding racial harassment on campus, its recommendations regarding the need for a racial harassment policy, and a proposed racial harassment policy if the committee feels that one is necessary.

After the campus has had time to discuss and debate the report, the committee should hold a second hearing where all interested individuals and organizations are invited to testify about the report and its recommendations. Following the second set of hearings, the committee should issue a final report to the President and Board of Trustees.

There are several very important reasons for proceeding this way. First, it will discipline the process by focusing on the behavior the university wants to prohibit rather than on the language of the policy. This will contribute to the development of a narrow and clear policy that will make it more defensible. The process will also enhance the policy's defensibility because it will demonstrate to a reviewing court that the policy was not imposed on the university community by a small group of administrators, but rather evolved from a process that included all elements of the academic community.

Second, the process will serve an important educational function. It will give everyone on campus a better understanding of the scope and nature of racial harassment and of the damage that it can inflict. Third, it will give the campus a better understanding of the limits of the First Amendment.

Finally, the process will give all concerned a greater degree of confidence in the policies and in their related procedures, thus reducing the chances that they will be challenged in court, and increasing the likelihood that victims of harassment will actually use them. Some observers of racial disorders on campus have reported that they occurred, at least in part, because students did not utilize existing university procedures because they were not involved in their development and therefore lacked confidence in them.

V. Keep the Policy In Perspective

My final suggestion is that a university's response to the problem of racial harassment must be broader and more comprehensive than written policies penalizing racist speech. A racial harassment policy, if one is needed at all, should be only part of a comprehensive response to the problem. Colleges and universities throughout the country have developed a variety of programs designed to prevent racial harassment from occurring and to deal with it when it does. These programs include counseling, mediation, improved communication, education, and strengthened efforts to hire minority faculty and administrators.

There are, of course, strong policy reasons for developing comprehensive programs of this kind. There are also compelling legal reasons for doing so. Like the procedures I suggested earlier, including racial harassment policies as only part of a comprehensive program will help to discipline the process by ensuring that the policies are narrowly drawn to deal with only the most egregious types of harassment. This approach will also make the policies more defensible by demonstrating to a reviewing court that the university is trying to deal with the underlying causes of the problem rather than simply penalizing speech.

One final point: while it is important to ensure that the university's response to the problem of racial harassment is comprehensive and includes both educational programs and racial harassment policies, it is equally important to ensure that the university does not use its educational programs as sanctions against those who have participated in activities protected by the First Amendment. Some universities seem to believe that First Amendment problems can be avoided if students who engage in racial harassment, instead of being punished, are required to attend educational programs or to apologize to their victims. This belief is wrong if a reviewing court subsequently determines that the speech in question was protected by the First Amendment. If it was, the university cannot impose any sanction, even one as mild as education or counseling.

VI. No Easy Answers

I hope these suggestions are helpful, although I am the first to acknowledge that it is much easier for me to stand here in Washington advising you on how to avoid a conflict with the First Amendment than it is for you to return to campus and actually accomplish it.

That reminds me of an old story about Will Rogers. During World War II, Rogers appeared before a congressional committee and testified that he knew how to end the war in the North Atlantic. The way to end that war, he said, was to bring the Atlantic Ocean to a boil which would in turn force the German U-boats to surface where they could be destroyed by American warships. The chairman of the committee told Mr. Rogers that he thought that was quite an intriguing idea, but asked him how he intended to bring the Atlantic Ocean to a boil. "I haven't thought about that," said Mr. Rogers, "but I am sure there are experts in the War Department who will know how to do it."

The Institute is a national educational and research center dedicated to the study of and response to ethnoviolence.

RACIAL HARASSMENT AT UNIVERSITIES: LEGAL ISSUES TO CONSIDER WHEN DEVELOPING AND IMPLEMENTING A RACIAL HARASSMENT POLICY

BY WALTER B. CONNOLLY, JR. AND ALISON B. MARSHALL

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I. INTRODUCTION

In Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989), Judge Avern Cohn enjoined the University of Michigan from enforcing that part of its Policy on Discrimination and Discriminatory Harassment that applied to speech activity on the grounds that the policy was overly broad and violated the first amendment and unduly vague so that its enforcement would violate due process. This ruling came at a time when colleges and universities across the country were in the process of developing and/or revising racial harassment policies to address the proliferation of racially motivated incidents, ranging from cross burnings, crude racial caricatures, racial threats and violence to tasteless ethnic jokes and racist graffiti and epithets. The decision also came shortly after the United States Supreme Court's reminder in Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988), that some types of speech "could result in tort liability to the school."

There are two competing interests that college and university administrators must balance, the right of students and employees to be free from racially motivated harassment which interferes with their studies and work and the right of students and employees to freely express their views in an academic setting. Unfortunately, there is no bright line for determining when expressions or speech cross from permissive and/or protected speech to actionable racial harassment. The best any administrator can do is draw guidance from the existing case law, much of it developed in the employment context, as to what the courts have considered to constitute impermissible racial harassment and to develop a policy that balances the demands of existing law with the needs and policies of the academic institution. This paper offers some guidance in factors that should be considered in striking this balance.

II. WHAT IS THE COLLEGE OR UNIVERSITY'S POTENTIAL LIABILITY FOR RACIAL HARASSMENT

It is not simply the tort law to which the Hazelwood Court referred which administrators must consider; attention must be given to the panoply of federal and state statutory and common law remedies which exist to address race-based discrimination and harassment. The following is an overview of some of the existing law that administrators should consider when developing a policy.

A. Title VI

Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* provides:

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Thus, Title VI provides a remedy for individuals who have been discriminated against by an institution or organization which is the recipient of federal funds. Most courts hold that there is a private cause of action under Title VI although some limit the relief available to an individual to equitable relief, precluding monetary remedy. Other courts have held that compensatory damages may be available if intentional discrimination is established. See Singh v. Superintending School Committee of the City of Portland, 601 F. Supp. 865 (D. Me. 1985).

Through the Civil Rights Restoration Act of 1987, Congress overturned the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984), wherein the Court had held that the reach of Title IX, governing sex discrimination, was program specific. Congress, removed the "program specific" restriction, and Title VI now provides that the term "program or activity" and "program" means all of the operations of "a college, university, or other postsecondary institution, or a public system of higher education: . . .any part of which is extended Federal financial assistance." 42 U.S.C. §2000d-4a (Supp. 1988).

B. Title VII

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq, prohibits discrimination in employment on the basis of race.[1] A work environment characterized by racial harassment or hostility is actionable under Title VII. Supervisors and managers need not have been involved in the harassment for the university to be held liable; it may be enough for managers or administrators to know of the acts and fail to take reasonable steps to eliminate them. See e.g. Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417 (7th Cir. 1986)(An employer who has reason to know that one of his employees is being harassed in the workplace by others on the basis of race and does nothing about it is blameworthy).

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[1] The Supreme Court's decision this term in EEOC v. University of Pennsylvania, ___U.S. ___, 110 S.Ct. 577 (1990), demonstrates the Court's willingness to pierce the once sanctified world of academic freedom to root out discrimination. In this case, the Court held that the University could be required to comply with an EEOC subpoena seeking production of peer review materials.

In Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), a sexual harassment case, the Court left open the the question of when an employer will be held liable for sexual harassment by supervisory employees. The Court did, however, indicate some factors that will be considered in determining employer liability. First, the Court rejected the notion that employers will be automatically held liable for hostile environment harassment created by their supervisors. The Court directed lower courts to look at traditional agency principles, and noted that Title VII defines "employer" to include any "agent" of an employer. Thus, the Vinson Court concluded that Congress intended to limit the acts of employees for which employers are liable under Title VII. At the same time, the absence of notice to any employer does not necessarily insulate that employer from liability.

Second, the Vinson Court instructed lower courts to look to (1) whether the employer had a grievance procedure, (2) whether the employer had a policy against discrimination, and (3) whether the employee invoked the policy. Although the existence of a policy or the employee's failure to use that policy may not be dispositive of employer liability, it will certainly be an important factor. 447 U.S. at 72. Indeed, the Vinson Court suggests that the stronger an employer's policy, the stronger its defense against harassment claims will be.[2]

C. §1983

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Any college or university official who, under color of state law, subjects a student or employee to discriminatory treatment, may be liable to that individual under section 1983. Section 1983 provides a means of enforcing the constitutional guarantee to equal protection and due process against university officials. Courts have applied the equal protection clause of the 14th amendment to sexual harassment claims; it could apply as well as to claims of racial harassment. See e.g. Estate of Scott by

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[2] Title IX of the Education Amendment Act of 1972 prohibits sex discrimination in programs receiving federal financial assistance. The implementing regulations require education recipients to adopt and disseminate a policy against sex discrimination and to establish a grievance mechanism. There is no similar requirement under Title VI; however, courts do look favorably upon the existence of a policy.

Scott v. De Leon, 603 F. Supp. 1328 (E.D. Mich. 1985); Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986).

The prerequisite to a §1983 action, however, is that the official was acting under color of state law or is a "state actor." In many instances, therefore, private colleges and universities will not be subject to §1983 actions. For instance, in Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988), the court affirmed the lower court's ruling that a private college's discipline of students did not constitute "state action" within the meaning of the civil rights statute even though a New York Statute required colleges to adopt disciplinary rules and file them with the state. The plaintiffs had been suspended from Hamilton College after they refused to end a three-day occupation of the main administration building. They claimed that they had been denied due process in violation of §1983 and were discriminated against on the basis of race and national origin in violation of §1981. In concluding that the college was not a state actor, the court held that the decision to suspend the students was ultimately "a judgment made by a private party according to professional standards that were not established by the state." 851 F.2d at 571.[3]

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[3] The Court also reversed the dismissal of the §1981 claim and held that plaintiffs should be permitted to replead this claim.

Public school officials may be protected from liability be a qualified immunity.

> In varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.

Scheuer v. Rhodes, 416 U.S. 232, 247 (1974).

D. §1981

Following the Supreme Court's decision in Patterson v. McLean Credit Union, ___U.S.___, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), a student or employee will not have a cause of action against the University or college for racial harassment under section 1981, 42 U.S.C. § 1981. In Patterson, the Court held that racial harassment is not actionable under §1981; §1981 covers only "conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." See also Hayes v. Community General Osteopathic Hospital, 730 F. Supp. 1333 (M.D. Pa. 1990)(racially motivated discharge is not actionable under §1981); Crader v. Concordia College, 724 F. Supp. 558 (N.D. Ill. 1989)(no cause of action under §1981 for race-based harassment, discipline, or discharge claims). There is legislation pending in Congress which would overturn or modify the Patterson decision.

E. State Discrimination Laws

Most states have laws on their books prohibiting discrimination in employment, public accommodations and the like.

Thus, an employee or possibly a student who believes he or she has been the victim of racial harassment may have a cause of action under such state law. In addition, a number of states have constitutions which guarantee citizens rights comparable to those protected by the U.S. Constitution, including the right to privacy, free speech and equal protection. Thus, universities should check their state constitutions.

F. Contractual Rights

1. Employees

Many college and university employees and faculty are employed pursuant to written contracts or collective bargaining agreements. In addition, employee handbooks and policy manuals can give rise to implied contracts adding to the rights the employee may be able to exercise against the university. At the same time, the university can use such handbooks to create contractual obligations on the part of its employees that they will not engage in racial harassment. This is best achieved through well drafted handbooks and/or policy statements which clearly set forth the obligations and expectations of the parties. Penalties for violations should also be contained in the writings.

2. Students

A university's relationship with its students is, in part, contractual. Corso v. Creighton University, 731 F.2d 529 (8th Cir. 1984). Thus a public university student has a protected interest in continuing his studies. See Picozzi v. Sandalow, 623

F. Supp. 1571, (E.D. Mich.), aff'd 827 F.2d 770, cert denied 108 S. Ct. 777 (1986). Student handbooks, college bulletins and catalogues and official policies of the institution can give rise to express or implied contracts. It follows, therefore, that policy statements prohibiting racial discrimination and harassment may be enforceable in contract actions. But see Russell v. Salve Regina College, 649 F. Supp. 391 (D.R.I. 1986)(under Rhode Island law, student could not state cause of action against private college for wrongful dismissal).

G. Other Common Law Actions

1. Defamation

An individual who believes he or she has been slandered or libeled by a statement made by someone who speaks on behalf of the university or for whom the university is responsible may have a cause of action in defamation. Depending on the context in which the statement is made, the speaker may have a privilege to make the statements and not be subject to liability. See e.g. Rosenboom v. Vanek, slip op no 111412 (Mich. Court of Appeals, September 12, 1989)(affirming summary judgment for the defendant, court held that female university student was qualifiedly privileged to report alleged sexual assault).

2. Intentional Infliction of Emotional Distress

Employees or students who are subjected to racial harassment by university employees may have a cause of action for intentional infliction of emotional distress. See e.g. Ledsinger v. Burmeister, 114 Mich. App. 12, 18-19; 318 N.W.2d 558 (1982).

To prevail on such a claim, the plaintiff must be able to establish "extreme and outrageous conduct" by the defendant. If an act of discrimination is blatant and the plaintiff can show an intent to humiliate, he or she may prevail on a claim of intentional infliction of emotional distress.

3. Negligence

If a professor, for instance, racially harasses a student, that student might have a cause of action against the college or university for negligent hiring or negligent supervision.

III. WHAT CONSTITUTES ACTIONABLE RACIAL HARASSMENT?

No universal definition of racial harassment has been developed and none can be. Nevertheless, the courts have provided guidance to employers and university administrators as to what constitutes racial harassment.

"Harassment" has been defined as "words, gestures and actions, which tend to annoy, alarm and abuse (verbally) another person." Black's Law Dictionary 5th Ed. 1979, p.645. However, not all offensive words or conduct are actionable. For instance, in Vaughn v. Pool Co. of Texas, Pool Offshore Co. Div., 683 F.2d 922 (5th Cir. 1982), the court held that there was no violation of Title VII where black oil rigs workers were subject to raw pranks, crude jokes and verbal abuse, some of which had racial overtones, since racial slurs were bantered without hostility or racial animus and all employees were subject to similar abuse which was part of life on an oil rig.

The courts have not indicated how many incidents of harassment constitute pervasive discrimination so as to give rise to a claim of hostile environment racial harassment. Courts have held that a few isolated or trivial instances of discrimination are not sufficient to impute knowledge on the part of an employer. Thus, in Katz v. Dole, 709 F.2d 251 (4th Cir. 1983), the court held that an employer may rebut a showing of harassment by proving that the incident was isolated or genuinely trivial and by "pointing to prompt remedial action reasonably calculated to end the harassment." 709 F.2d at 256.

In some cases, the courts have required a pattern or practice of discrimination in order to establish a hostile work environment claim. See Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986)(a dozen incidents of racial harassment over a two and a half year period are insufficient to state a claim of racial harassment); Torres v. County of Oakland, 758 F.2d 147 (6th Cir. 1985)("While a continuing use of racial or ethnic slurs would violate Title VII, occasional or sporadic instances of such conduct does not."); Carter v. Duncan Higgins, Ltd, 727 F.2d 1225 (D.C. D.C. 1984)(single unreported incident of racism, standing alone, will not state a civil rights cause of action); Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981)(racial slurs by supervisors and other employees did not violate Title VII because they were infrequent and limited to casual conversation).

However, a single egregious incident of harassment has been has been held to create an abusive work environment actionable under Title VII. In Bailey v. Binyon, 583 F. Supp. 923, 926 (N.D. Ill. 1984), a corporate officer of the company which owned the restaurant in which the plaintiff worked called the plaintiff a "nigger." After the plaintiff protested the use of the epithet to the officer, who also happened to own the company, the officer replied, "you're not a human being, you're a nigger."

By holding in Vinson that sexual harassment that creates a hostile work environment is actionable under Title VII, the Supreme Court may have tacitly created another category of speech which is not protected by the first amendment. Of course, the Court did not address the first amendment implications of its decision in Vinson. Query whether there is a distinction between a public work place and the university in terms of balancing free speech and equality?

IV. PROTECTED FREE SPEECH OR ACTIONABLE RACIAL HARASSMENT?

A. Precedent Before Doe

Courts have long recognized that the right of free speech is not absolute at all times and under all circumstances. Certain categories of speech have historically been found by the courts to warrant less protection by the first amendment, and restrictions on such speech have been upheld. Thus, in Chaplinsky v. New Hampshire, 315 U.S. 568, 571-2 (1942), the Supreme Court held that an individual who called a police officer a "god damned racketeer" and "damned fascist" was not protected by the first amendment from criminal charges under a state statute prohibiting offensive speech directed at another person. According to the *Chaplinsky* court, insulting or "fighting words," "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected under the first amendment. Such utterances have slight social value and do not contribute to the search for truth which is the principle underlying the first amendment.

The *Chaplinsky* court engaged in a balancing analysis. It concluded that the slight social value that such fighting words contributed was "clearly outweighed by the societal interest in order and morality." 315 U.S. at 572. Thus, the Court evaluated the context and content of the speech and made a judgment therefrom. Another important aspect of the *Chaplinsky* decision is that it arose in the context of a one-on-one exchange, one person verbally abusing another person directly. In subsequent cases where the offensive expressions are not directed towards specific individuals, courts have been less likely to categorize the speech as "fighting words."

See also *Cantwell* v. *Connecticut*, 310 U.S. 296, 309-310 (1940)("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under the instrument."). *But see* *People* v. *Dietze*, 75 N.Y.S.2d 46; 549 N.E.2d 1166; 550 N.Y.S.2d 595 (1989)(overturning conviction under state statute prohibiting the use of abusive language with the intent to harass or annoy another person, the court held that the defendant's calling a mentally retarded woman and her son "bitch" and "dog" respectively and saying she "would beat the crap out of [complainant] some day or night on the street" was protected speech and therefore not actionable.)

Another category of speech which historically has been recognized as deserving less protection is that which creates a "clear and present" danger of lawlessness or violence. This category was first defined by the Supreme Court in Brandenburg v. Ohio, 395 U.S. 444 (1969), in which the Supreme Court overturned the conviction of a Ku Klux Klan leader for "advocating. ...the duty, necessity, or propriety of crime sabotage, violence or unlawful methods of terrorism. . . " and for "voluntarily assembling with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." The Court held that speech which is designed to incite violence or a violation of the law may be suppressed only when such advocacy is directed to inciting or producing imminent lawless action and it is likely to have that effect, that is to produce lawlessness immediately. Id at 447.

This concept was reiterated by the Court in Hess v. Indiana, 414 U.S. 105 (1973). In Hess, the Court overturned the disorderly conduct conviction of a college student who during a rally on campus had shouted "we'll take the fucking street later (or again)." The Court found that the student's words were not directed at any particular person or group and there was no evidence that they were intended or likely to produce imminent disorder. Therefore, the prosecution violated his first amendment rights.

A third category of speech which is subject only to limited protection, if any, is obscenity. See Miller v. California, 413 U.S. 15, 22 (1973). The difficult question, of course, is what constitutes obscenity. Child pornography is not protected. See New York v. Ferber, 458 U.S. 747 (1982).

Certain libel and slander also loses first amendment protection. See New York Times v. Sullivan, 376 U.S. 254 (1964)(if a statement regarding a "public figure" is made with knowledge of falsity or with reckless disregard of the truth or falsity, the statement is not protected by the first amendment).

In Beauharnais v. Illinois, 343 U.S. 250 (1952), the Court upheld a group libel law. The Illinois statute proscribed certain forms of racially inflammatory statements. Most such group libel laws have been repealed.

Finally, narrowly tailored restrictions which are content neutral and which are tailored to meet a particular purpose have generally been upheld. See e.g. Healy v. James, 408 U.S. 169, 192 (1972)("Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected."); Students Against Apartheid Coalition v. O'Neil, 838 F.2d 735 (4th Cir. 1987)(University of Virginia's lawn-use regulation prohibiting "structures" from south side of university rotunda in order to preserve the integrity of the upper lawn, a historical architectural area, did not violate the First Amendment as applied to the removal of symbolic shanties protecting university investment in South African corporations).

In the school context, there have been several important first amendment cases in which the Court has further defined under what circumstances speech may be limited, at least in the high school context. In Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Court upheld the right of high school students to wear black armbands in school. The wearing of armbands constituted pure political speech and deserved first amendment protection. The Court held that in the absence of any evidence of material disruption or substantial interference with school work or school discipline, school officials could not prohibit the wearing of armbands.

Distinguishing Tinker, the Court in Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986), held that a school could discipline a student for offensively lewd and indecent speech at a school assembly. During an official, school-sponsored, on-campus assembly, the plaintiff had given a speech nominating another student for elective office which was full of graphic and explicit sexual metaphor. The student was disciplined under a rule that provided that "conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." The Court held that discipline pursuant to this rule did not violate the student's first amendment rights. Although the thrust of the Court's opinion was the fact that schools may limit student speech to protect the sensibilities of children whereas such restrictions may not be appropriate when adults were involved, the Court also stated:

> The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

Id. at 681.

The most recent case in this line is *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), in which the Court held that a high school administrator's decision to remove two articles from a student newspaper prepared as part of a journalism class did not violate the students' first amendment rights. In so concluding, the Court first held that a school newspaper prepared as part of a course was not a public forum; the newspaper was intended as a supervised learning experience for journalism students. Therefore, school officials were entitled to regulate the contents of the paper in any reasonable manner. 108 S. Ct. at 569.

Moreover, because the paper was sponsored by and paid for by the school as part of its curriculum, the Court held that the school may set high standards for the paper, taking into account factors such as the emotional maturity of the intended audience in determining whether to disseminate student speech on sensitive topics. So long as the educators' actions are reasonably related to legitimate pedagogical concerns, they do not offend the first amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities; "otherwise, the schools would be unduly constrained from fulfilling their role as 'a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.' " Id. at 570. Thus, when the school's name and resources are associated with the speech, the standard articulated in Tinker for determining whether a school may punish student expression does not apply.

Query whether this distinction applies in the college or university context. Colleges and universities do not share the special characteristics of the school environment that high schools do, and college and university students have greater first amendment rights. Nevertheless, it is also clear that a college or university may exercise far greater control over publications that carry the school's name or which are funded by the school than it can over other student-generated speech. See e.g. Papish v. Board of Curators of University of Missouri, 93 S. Ct. 1197 (1973)(Court held that university could not expel a graduate student who distributed an underground newspaper the front page of which contained a headline which read, "Motherfucker acquitted," referring to a police officer.).

It was against the backdrop of this precedent that Judge Cohn issued his decision regarding the University of Michigan's harassment policy.

B. Doe v. University of Michigan

In Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989), the court concluded that the University of Michigan's policy as applied to education and academic centers was unconstitutional. This was the first case to apply the first amendment to a racial harassment policy.

The University's policy established a three-tiered system; the degree of regulation was determined by the location of the conduct or speech in issue. Public speech and conduct was the least restricted; only an act of physical violence or destruction of property would result in action. Speech and conduct of students living in University housing was governed by the standards of individual leases and the constitutionality of the policy as it applied to verbal conduct and behavior in university housing was not challenged in this lawsuit.

The policy also governed "educational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers." It was this type of forum which was the focus of the court's analysis.

In holding that the policy was overly broad in violation of the first amendment, the court recognized that there were categories of speech such as speech that constitutes "fighting words" or a "clear and present danger", or which creates a hostile work environment in violation of Title VII, where restrictions had been upheld. However, the policy reached speech outside these categories. "If the Policy had the effect of only regulating in these areas, it is unlikely that any constitutional problems would have arisen." Id. at 863. The court, however, emphasized that the university could not "proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people." 721 F. Supp. at 863. The curt also emphasized that a state may not prohibit broad classes of speech, some of which may permissibly be regulated, if in doing so it restricts a substantial amount of constitutionally protected speech. Id. at 864.

The Doe court, in concluding that the policy as applied to academic centers was unconstitutional, was troubled by three incidents involving verbal statements made by students in the classroom. Although none of the incidents resulted in formal disciplinary action, and indeed, in the one incident which culminated in a formal hearing, the hearing panel found for the student, the court nevertheless found that these incidents reflected a lack of concern on the part of the university regarding the students' first amendment rights: "[a]lthough the student was not sanctioned over the allegations of sexual orientation harassment, the fact remains that the Policy Administrator -- the authoritative voice of the University on these matters -- saw no First Amendment problem in forcing the student to a hearing to answer for allegedly harassing statements made in the course of academic discussion and research." Id. at 865. The court also emphasized that the university never declined to pursue a claim because the alleged harassing conduct was protected by the First Amendment. Because the policy on its face and as applied extended to protected speech, the court concluded that it was not necessary for it to consider whether the policy was susceptible to a saving construction. Id. at 866 n.15.

The court further concluded that the university's policy was unconstitutionally vague because it did not give adequate warning as to what conduct was prohibited. For instance, the first section of the policy proscribed "any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race. . ." The court held that because such terms are too general and elude precise definition, the policy fails. Id. at 866-67.

C. Policies After Doe

The court's decision in Doe has generated great debate and has been sharply criticized. Some of those critical of the Doe decision argue that the court failed to balance the interests and rights of minorities and women who may be harmed by racist or sexist "hate" speech against the first amendment rights of the individuals speaking despite the fact that, in the opening paragraph of his opinion, Judge Cohn noted that he was being forced to balance the ideals of freedom and equality. 721 F. Supp. at 853. Instead, the court simply determined whether all of the speech reached under the university's policy fell within one of the narrow categories of speech which courts have permitted to be regulated. When he found that it did not, Judge Cohn concluded that the policy was overly broad. In other words, in the opinion of some, the court took too much of an absolutist first amendment position. [4]

Private colleges and universities, obviously, are not subject to the first amendment absent a finding of state action and, therefore, need not be as concerned about the import of the Doe decision.[5] Nevertheless, many private universities espouse the principles of free speech guaranteed by the first amendment and will seek to draw guidance from the decision.[6] Public universities must heed the first amendment's proscriptions.[7]

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[4] For a discussion critical of the Doe decision see Note 103 Harvard Law Review 1397 (1990). For discussion of the need for a balancing analysis, see Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story." 87 Michigan Law Review 2320 (August 1989).

[5] Even private schools, however, should check their state's constitution as some states may have provisions comparable to the first amendment which apply to private institutions.

[6] Indeed, if a private institution expresses such a policy in a handbook or its catalog, that provision may become contractually binding and an individual reprimanded for his or her speech might have a cause of action against the institution.

[7] One fact that must be borne in mind is that the Doe decision is one decision by one federal district court. It has no binding precedential effect on anybody except the University of Michigan. However, equally important is the fact that it is the first and only decision on this issue.

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The obvious question being asked is where does this case leave universities; what are they to do next? To answer this question, one should look back to what bothered the court. As mentioned above, the court concentrated on two facts. First, Judge Cohn was bothered by three incidents each of which involved classroom speech which he deemed to protected. Second, and related to the first, he was bothered by the fact that there was no evidence showing that when addressing these incidents, the university considered that the first amendment might protect the student's conduct.

What the Doe Court seems to suggest, therefore, is that universities in structuring their policies and implementing any disciplinary procedures should engage in the balancing which Judge Cohn's critics claim he failed to do. In other words, universities should consider developing policies which specifically provide for a balancing of free speech interests against the harm done by the speech. This will necessarily involve an analysis of where, when and why the speech is being made as well as to whom it is directed. Offensive or racist speech which is directed at particular individuals will clearly be punishable. Statements in a classroom during an academic discussion that are directed towards an entire classroom of people may not be. Other scenarios may have to be examined on a case by case basis. The point is that the university would explicitly take into consideration the first amendment interests and weigh them against the harm caused by that speech to its audience.

One interesting aspect of the Doe case is that Judge Cohn, citing the Vinson case, recognized that one type of speech which is not protected is racial harassment in the workplace. 721 F. Supp. at 863. One must then ask how one distinguishes between racial harassment in a public workplace and what Judge Cohn and others may deem protected speech in the university. Following this line of reasoning to its logical conclusion may result in identical speech being actionable in the workplace and being protected in the university. Indeed, an employee at the University of Michigan might be subject to discipline, up to an including termination, for making a racially derogatory statement to a fellow employee, but be protected from discipline when making the identical statement in the classroom.

D. Can a University Terminate and/or Refuse Tenure to the Professor Who Makes Allegedly Racist Comments?

The United States Court of Appeals for the Second Circuit confronted this issue in Dube v. The State University of New York at Stony Brook, 1990 U.S. App. LEXIS 6038, No. 88-7980 (2d Cir., April 12, 1990). In Dube, a professor from South Africa filed suit against the State University of New York ("SUNY") and several professors and administrators, claiming that he had been denied tenure because of his discussion of "controversial topics" in his classroom in violation of the First Amendment. Dube further claimed that the denial of tenure violated his right to due process.[8]

Dube had been hired by SUNY in 1977 as an assistant professor in its Africana Studies Program. In the fall of 1981, Dube started teaching a course entitled "The Politics of Race." An outline he prepared for the course made reference to "[t]he three forms of racism and how they manifested themselves: 1) Nazism in Germany, 2) Apartheid in South Africa and 3) Zionism in Israel." In July 1983, a visiting professor from Israel allegedly sent a letter to the administration and to a number of professors stating that by equating Zionism with Nazism, Dube was using his position for the "propagation of personal ideology and racist biases." Following an internal investigation, the University Senate voted that Dube's teachings were within the bounds of academic freedom.

According to Dube's complaint, thereafter, the Long Island branch of the Anti-Defamation League of B'nai Brith and the American Jewish Committee mounted a publicity and lobbying campaign directed at the University President urging the university to discontinue Dube's affiliation at the university. The President issued a public statement distancing himself and the University from Dube's positions.

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[8] Professor Dube also raised several pendent state law contract claims.

Dube became eligible for tenure in 1983-1984, but asked to have his consideration delayed for one year. He was, therefore, considered for tenure and promotion during academic year 1984-1985. Ultimately, the recommendation was made that Dube be denied tenure. He appealed and then filed suit against the university and a number of administrators and professors.

The University argued that it was immune from suit under the Eleventh Amendment.[9] Both the district court and Court of Appeals agreed; thus, the University was dismissed from the lawsuit. However, the individual defendants remained, and the Court of Appeals held that Dube's first amendment claim against them should proceed to trial.

The court rejected the individual defendants' contention that they were shielded from liability by a qualified immunity and found that there was sufficient evidence from which a jury could conclude that plaintiff's first amendment rights had been violated. Specifically, the court found that there was an issue of fact as to whether defendants denied him tenure and promotion in response to pressure exerted by government officials and community activists outraged by his teachings.

In rejecting qualified immunity as a defense, the court noted that although courts should give deference to academic decisions, "it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion or intimidation 'that cast a pall of orthodoxy' over the free exchange of ideas in the classroom.'" Id.; quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). Assuming that defendants retaliated against Dube for the content of his classroom discourse, such conduct "was, as a matter of law, objectively unreasonable." Id.[10]

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[9] The Eleventh Amendment provides that "[J]udicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the (Footnote Continued)

What this case suggests, particularly when read in conjunction with the Doe case, is that the courts seem to be striking the balance in favor of free speech and will protect the free speech rights of faculty members even when the speech is offensive to large groups of students and peers.

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[10] The Dube court reiterated the importance of the classroom as a marketplace of ideas, citing Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957):

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . .Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

V. WHAT ABOUT DISCIPLINE OF STUDENTS -- WHAT LEGAL PITFALLS EXIST?

A. Introduction

In Dartmouth Review v. Dartmouth College, 889 F.2d 13 (1st Cir. 1989), the court rejected claims by three white male students that their suspensions following a confrontation with a black professor were racially motivated. The students were all editors of the Dartmouth Review, an off-campus newspaper which had published a feature that was sharply critical of one of the professor. The plaintiffs sought to have a response from him and when he did not respond to telephone calls, they approached him in his classroom, which resulted in the confrontation.[11]

Charges of harassment and disorderly conduct were brought against the students by the Committee on Standards. Following a hearing at which the students claim they were denied fundamental fairness and any procedural safeguards, including the right to counsel, the students were found guilty on all charges and were issued suspensions of varying lengths. The suspensions were upheld on appeal.

The students then filed suit in federal court claiming violations of 42 U.S.C. § 1981 and 42 U.S.C. §2000d (Title VI), claiming that they had been subjected to race-based discrimination. The district court dismissed their claims on the grounds that the complaint was insufficient to state a federal claim. The Court of Appeals affirmed.

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[11] The facts surrounding the nature of the confrontation are in dispute. For purposes of the legal issues before it, the Court accepted the facts as presented by the plaintiffs, the students.

Plaintiffs claimed that defendants bowed to the popular perception of the confrontation as a racial incident and played "racial politics", thereby chilling expression and preventing plaintiffs from receiving a fair hearing. Defendants thereby allegedly impermissibly considered race as a factor in the discipline of the students. In affirming the dismissal of plaintiffs' complaint, the Court of Appeals noted that the thrust of the plaintiff's claim was that their white race was the determining factor in their suspensions because they had been accused of committing a racist act against a black professor. According to the students' theory, if they had been non-white, the confrontation would not have been deemed racists and they would not have been disciplined. The Court rejected such simplistic reasoning:

> The assumption is not only unproven, but unfounded, neither logically nor legally compelled. And, the reasoning associated with the assumption is sophistic. Racial difference is by no means a condition precedent to labelling an incident "racist;" nor are belligerent responses to perceived racial attacks, without more, presumed to be based on the perpetrators' race. Condemning acts as racist implies nothing about the actor's race, but signifies only that the victim's race was the cause of the invidious harm.

889 F.2d at 18.

B. Due Process

In disciplining students, appropriate due process must be accorded to the students. A complete discussion of due process in the academic setting is beyond the scope of this paper; however, a few points should be made. For instance, in Goss v. Lopez, 419 U.S. 565 (1975), the United States Supreme Court held that the due process clause requires that a student facing suspension must be given notice and a hearing. A student is entitled to specificity in the charges levied against him or her and, unless there are serious concerns of safety, a hearing before dismissal.

In Jackson v. Hayakawa, 761 F.2d 525 (9th Cir. 1985), the court confronted the issue of due process and the type of evidence needed to support disciplinary action by a university. The plaintiffs, students at San Francisco State College, had attended a rally which had resulted in numerous police reports for disorderly conduct; the students were subsequently disciplined. The court held that there was no evidence to establish that the students who were disciplined who had attended the rally had individually committed the disorderly acts; thus, there was insufficient evidence to support disciplinary action as required by due process.

Although it is clear that the hearing need not conform to the procedures of a civil or criminal court proceeding to satisfy due process, it is less clear what is required in a particular case. One requirement is that the hearing be conducted by an impartial party.

Whether a student has a right to counsel is an issue of substantial debate. Generally, a university should permit a student to have counsel when facing dismissal. But See Jaksa v. Regents of University of Michigan, 597 F. Supp. 1245 (E.D. Mich. 1984) aff'd 787 F.2d 590 (6th Cir. 1986)(court held that lack of an attorney did not violate due process where the issues were simple and the university did not employ counsel).

VI. CONCLUSION

There have been some significant recent developments relating to freedom of expression and campus racial harassment policies. Although the decisions to date seem to favor protecting speech over quashing racial harassment, Supreme Court precedent would suggest that a balancing of the relative interests is appropriate, that is that there are no absolutes.

Thus, there is still a place for strong policy statements condemning racial harassment in the university and instituting grievance and disciplinary procedures for incidents which simply cannot be tolerated in an academic environment. But in designing and implementing such policies, universities should bear in mind that the free expression rights of the speakers, particularly in the classroom or comparable academic context must be respected no matter how repugnant or offensive the speech may be to the audience. At the same time, the policy must be sufficiently specific so that students, faculty and employees will know what is prohibited. And, it must set forth the criteria by which a grievance will be evaluated so that administrators understand in advance how the policy will be applied.

THE CONSTITUTIONAL STATUS OF EXPRESSIVE CONDUCT AFTER THE FLAG-BURNING DECISION

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I. BACKGROUND: A SELECTIVE BIBLIOGRAPHY ON THE JURISPRUDENCE OF SYMBOLIC SPEECH

A. Contemporary Works:

-- 3 R. Rotunda, J. Nowak, J. Young, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE Ch. 14 ("Symbolic Speech") (1986 & 1989 Pocket Part). A cursory but relatively complete introduction to the Supreme Court's principal "symbolic speech" decisions, and a good source of references to pertinent law review articles.

-- L. Tribe, AMERICAN CONSTITUTIONAL LAW 821-32 (2d ed. 1988). A brief and helpful introduction for those who wish to place the "symbolic speech" cases in a broader First Amendment context. The footnotes contain a treasure of useful treatise and law review citations.

-- Loewy, Essay: The Flag-Burning Case: Freedom of Speech When We Need It Most, 68 N.C.L. REV. 165 (1989). As this outline goes to press, Professor Loewy's essay is the only law review commentary yet published on Texas v. Johnson. It is a detailed, provocative, and (as one can gauge from the title) opinionated analysis of the decision. [If you think that title gives Professor Loewy's biases away, *see* Loewy, *Punishing Flag Desecrators: The Ultimate in Flag Desecration*, 49 N.C.L. REV. 48 (1970).]

B. *Historical Works*:

-- Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975). If the distinction between "speech" and "conduct" eludes you, try Professor Ely's analytic approach -- it will never be expressed more clearly.

-- T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 79-90 (1970). Professor Emerson's great legal-philosophical work on the meaning of free expresion is probably the most lucid explanation ever written of the policies served by liberal construction of the Speech Clause.

-- Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968). An excellent, spirited discussion of the seminal Supreme Court decisions of the 1930s, '40s, and '60s.

II. BEFORE THE FLAG-DESECRATION CASES: EVOLUTION OF THE DOCTRINE OF EXPRESSIVE CONDUCT[1]

A. *What Is "Expressive Conduct"?* It has been usefully defined as "an exceptionally vivid means of communication" ordinarily undertaken by one who lacks access to the media in order to express a politically or socially unpopular view. Note, *Symbolic Conduct*, *supra*, 68 COLUM. L. REV. at 1091. Common examples of expressive conduct:

-- Sit-Ins. *Brown v. Louisiana*, 383 U.S. 131 (1966).

-- Picketing. *Cox v. Louisiana*, 379 U.S. 536 (1965).

-- Anti-war protesting. *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

-- Draft-card burning. *UNITED STATES v. O'BRIEN*, 391 U.S. 367 (1968).

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[1] Capitalized case names are used to denote particularly significant or illuminating decisions.

(It is no accident, obviously, that expressive conduct was given its greatest judicial content in the 1960s, a period that combined social unrest with the maturation of America's great mass medium, television.)

B. Origins of the Concept of "Expressive Conduct." An oft-cited principle of First Amendment law is that the Speech Clause protects speech, not conduct. For a century and a half, courts drew the distinction with almost childlike simplicity: speech was "the utterance or publication of abstract 'doctrine' or academic discussion" -- and conduct was anything else! Any conduct, including "utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the peace," was regulable as a valid exercise of the state's police power. E.g., Gitlow v. New York, 268 U.S. 652, 664, 667 (1925). But as the Second World War approached and American society became religiously, politically, and ethnically more pluralistic, courts slowly recognized that people engage in some forms of conduct for the purpose of communicating ideas. In two major cases -- Stromberg v. California, 283 U.S. 359 (1931), and West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) -- the Supreme Court first suggested then accepted the notion that certain "expressive" acts were entitled to constitutional protection.

C. The O'Brien Balancing Test for Assessing State Restrictions on Expressive Conduct.

(1) In the early 1960s, sit-in cases were the vehicle used by the Supreme Court to make law in the "expressive conduct" area. Not surprisingly, given the sympathetic defendants in those cases and the liberal makeup of the Court in the heyday of the Warren majority, the decisions were majestic and the language employed frequently unrestrained. E.g., Garner v. Louisiana, 368 U.S. 157 (1961); Brown v. Louisiana, 383 U.S. 131 (1966).

(2) UNITED STATES v. O'BRIEN, 391 U.S. 367 (1968), represented a critical turning point in the Court's effort to systematize and establish limits on the newly expanded doctrine of expressive conduct. The defendant in O'Brien was an 18-year-old antiwar activist who publicly burned his draft card on the steps of a Boston courthouse. On appeal from a criminal conviction for violating the Selective Service Act, he argued that the

federal statute unconstitutionally punished him for engaging in "symbolic speech" protected by the First Amendment. Assuming (without deciding) that O'Brien's act of defiance contained a "communicative element" that brought the Speech Clause into play, a near-unanimous Court nevertheless held that the statutory prohibition against draft card burning was justified under the circumstances and did not constitute an unreasonable restriction on the exercise of free-speech rights. The Court fashioned a four-part balancing test for determining when government regulation of expressive conduct is justified:

> [W]e think it clear that a government regulation is sufficiently justified if [1] it is within the constitutional power of the Government; if [2] it furthers an important or substantial governmental interest; if [3] the governmental interest is unrelated to the suppression of free expression; and if [4] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. [391 U.S. at 377.]

Showing great deference to the governmental interests served by the Selective Service Act, the Court held that O'Brien was "constitutionally convicted" for violating it.

(3) Exceptions to O'Brien: Some forms of conduct are so closely related to political expression that, in and of themselves, they merit constitutional protection. In Tinker v. Des Moines School District, 393 U.S. 503 (1969), high school students were suspended for wearing black armbands in silent protest of American military involvement in Vietnam. Although the students' conduct was a pristine example of "expressive," nonverbal speech, and notwithstanding the fact that O'Brien had been decided only nine months before, the Court ignored O'Brien and labelled the students' conduct "pure speech" which high school authorities had no reason to regulate. 393 U.S. at 508. Some other examples of what might be termed "political conduct" entitled to special constitutional deference:

-- Door-to-door political canvassing. City of Watseka v. Illinois Public Action

Council, 470 U.S. 1048 (1987) (mem.), affirming 796 F.2d 1547 (7th Cir. 1986).

-- Solicitation of charitable contributions. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

-- Civil rights demonstrations. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

III. THE FLAG-DESECRATION CASES

A. Cases from the Licentious '60s and '70s

(1) Street v. New York, 394 U.S. 576 (1969). This was a case that generated much intellectual and popular excitement -- until the Supreme Court decided it by dodging the main issue. The defendant, after hearing a radio report that a sniper had shot James Meredith in Mississippi, took a neatly folded flag from his desk drawer, went to the nearest intersection, and set the flag on fire with a match. By the time police arrived, a small crowd had gathered. Police officers heard Street say to the crowd, "We don't need no damn flag .... If they let that happen to Meredith we don't need an American flag." Street was subsequently convicted of violating an unusual state statute that criminalized both the mutilation of the flag and the use of "words ... [to] cast contempt upon" the flag. When the case reached the Supreme Court, Justice Harlan for a bare majority of the Court sidestepped the main issue presented by the parties -- whether Street's action in burning the flag amounted to constitutionally protected "symbolic speech" -- and vacated the conviction on the technical ground that the Court could not determine from the record whether Street had been convicted for the act of burning the flag or for the words he uttered while engaged in that task.

(2) Smith v. Goguen, 415 U.S. 566 (1974). For the second time, the Court took the easy way out. A young man was arrested by the sheriff of a rural New England town for sporting, on the rump of his blue jeans, a four-inch by six-inch patch in the form of an American flag. He was convicted and sentenced to six months in jail (!) under a statute penalizing "contemptuous treatment" of the

flag. On collateral habeas corpus attack, the federal courts, including the Supreme Court, reversed the conviction on the ground that the statute was unconstitutionally vague. "We have not addressed Goguen's First Amendment arguments," wrote Justice Powell in a concluding footnote, "because, having found the challenged statutory language void for vagueness, there is no need to decide additional issues." 415 U.S. at 583 n. 32. Four Justices, however, were less inhibited; in a series of concurring and dissenting opinions, the minority Justices applied the four-part O'Brien test to support arguments in favor of (Rehnquist, Burger, and Blackmun) and against (White) the constitutionality of the statute.

(3) SPENCE v. WASHINGTON, 418 U.S. 405 (1974) (per curiam). This case, decided only three months after Goguen, was technically a flag "alteration" case rather than a flag "desecration" case -- one of many fine points deemed significant in a decision notable for its close attention to unique (and extremely sympathetic) facts. Spence was a college student who lived in an apartment building in Seattle. Distraught over the American invasion of Cambodia and the killings at Kent State University, he hung in the window of his apartment an upside-down American flag with a peace symbol made of black electrician's tape superimposed in the center. He explained his purpose at trial:

> I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace.

He also testified that he made the peace symbol from tape "so that it could be removed without damaging the flag." When police officers saw the flag and entered the apartment building, Spence met them at the door and said, "I suppose you are here about the flag. I didn't know there was anything wrong with it. I will take it down." He allowed the officers to enter his apartment, where the flag was seized and he was arrested. He was subsequently prosecuted, not for flag desecration, but under the state's separate "improper use" statute making it a crime to place figures or marks on a publicly displayed flag. The Supreme

Court, to nobody's surprise, reversed the conviction of this saint-like defendant. The per curiam decision contained three important holdings:

- First, the Court explicitly recognized for the first time "the communicative connotations of the use of flags." "[T]here can be little doubt that [Spence] communicated through the use of symbols" and thereby engaged in an activity "sufficiently imbued with elements of communication to fall within the scope" of the First Amendment. 418 U.S. at 409-410.

- Second, the Court paid unusually emphatic attention to "the context" in which Spence made symbolic use of his flag, id. at 410:

    - The chronological proximity of Spence's action to the Cambodian incursion and Kent State killings, "issues of great public moment";

    - The unmistakably political motivation for his action;

    - The fact that Spence's action "occurred on private property";

    - The peaceful, nonprovocative manner in which Spence acted; and

    - The temporary nature of the act: Spence "did [not] permanently disfigure the flag or destroy it." Id. at 412-15.

- And third, the Court was not receptive to generalized justifications advanced by the State in support of its "improper use" statute. To the state's argument that the statute furthered the important government interest "in preserving the national flag as an unalloyed symbol of our country," the Court answered that, even assuming the validity of that interest, "[t]he statute is nonetheless unconstitutional *as applied* to [Spence's] activities" since the state had made no showing that Spence's actions had diminished the flag's symbolic importance. *Id.* at 412-14 (emphasis added).

B. *Flag Desecration Revisited: TEXAS v. JOHNSON, 109 S.Ct. 2533 (1989)*.

(1) Gregory Johnson was no saint. He was part of a rabble-rousing political protest group that sought to disrupt the 1984 Republican National Convention by chanting, parading, spray-painting slogans on buildings, and burning a kerosene-doused flag on the steps of City Hall. Johnson was convicted for desecrating a venerable object under a state statute defining desecration as "physical mistreat[ment] in a way that the actor knows will seriously offend one or more persons likely to observe ... his action."

(2) The Supreme Court reversed Johnson's conviction, declared the Texas desecration statute unconstitutional, and in the process melded *O'Brien* and *Spence* into a new constitutional test for expressive conduct. Writing for an odd five-member majority (himself and Justices Marshall, Blackmun, Scalia, and Kennedy), Justice Brennan held that expressive-conduct cases were to be analyzed by considering two questions in sequence:

-- *Does the defendant's action qualify as "expressive conduct" entitled to Speech Clause protection?* It does if:

  -- The defendant "inten[ds] to convey a particularized message," and

  -- "[T]he likelihood [is] great that the message [will] be understood" by the intended audience, given the *context* in which the action is taken.

(109 S. Ct. at 2539, *quoting Spence, supra*, 418 U.S. at 410-11.) Given the inherently "communicative nature of conduct relating to flags," and given the political backdrop against which Johnson took his action -- a national

party convention -- Justice Brennan had no difficulty concluding that Johnson's conduct was entitled to First Amendment protection. This marks the first time the Supreme Court has ever held that flag desecration is a form of constitutionally protected speech.

- The inquiry does not end there, however. Even in the realm of constitutionally protected speech, the government may still regulate such speech if regulation is warranted by a suitably important state interest. The next inquiry: If the defendant's action qualifies as "expressive conduct" entitled to Speech Clause protection, what is the nature of the interest asserted by the state as the basis for regulating the conduct at issue? Here Justice Brennan complicates matters:

    - If the state's interest is "content-based" -- in other words, related to the subject-matter of the expressive conduct rather than the consequences flowing from that conduct -- then *O'Brien* does not apply, and government regulation can be sustained only upon a showing of the most compelling state interest.

    - If, on the other hand, the state's interest is "unrelated to the suppression of free expression," then "*O'Brien's* relatively lenient standard" controls and the state need only show an "important" interest justifying restriction of expressive conduct.

  109 S. Ct. at 2538. The Texas desecration statute, said Justice Brennan, came within the first category because, by prohibiting actions intended to offend other persons, the statute inevitably made the content of expressive conduct an element of the crime. (For those

perplexed by Justice Brennan's logic, you are not alone. It is almost impossible to imagine any form of expressive conduct that would *not* be "content-based" under Justice Brennan's formulation. That being the case, it could be said that the real significance of *Johnson* lies in its emasculation of *O'Brien* and the replacement of the four-part *O'Brien* test with a more stringent "compelling interest" test. Time will tell whether the lower courts read *Johnson* that expansively, and whether *O'Brien* becomes just another "national security" exception in the otherwise progressive flow of First Amendment law.)

(3) We come, finally, to the nub of the question, to the heart and soul of the Court's decision in *Johnson*. *Is there a compelling state interest that justifies flag-desecration statutes?* More particularly: The State of Texas (precisely as the State of Washington did in *Spence*) asserted an "interest in preserving the flag as a symbol of nationhood and national unity." 109 S. Ct. at 2542. Does that rise to the level of a "compelling" state interest?

-- No, answered Justice Brennan, citing (among others) *Spence*, *Street*, and *Barnette*. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. We have not recognized an exception to this principle even where our flag has been involved." 109 S. Ct. at 2544 (citations omitted).

-- Yes, vehemently argued Chief Justice Rehnquist in an extraordinary dissent replete with poetry, hymns, allusions to paintings, and patriotic rhetoric. *Id.* at 2548-55.

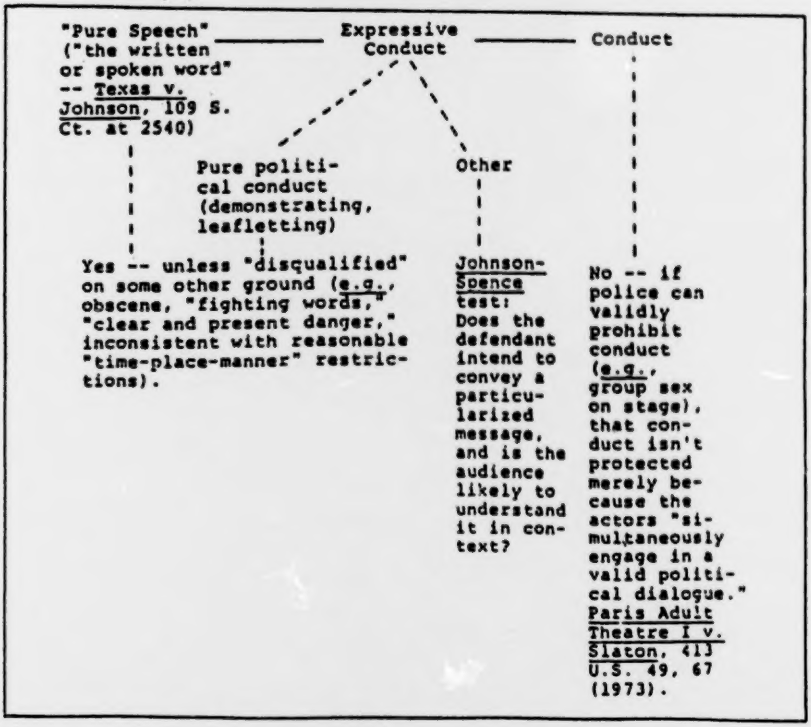
(4) Epilogue: Kennedy, J., concurring, and Stevens, J., dissenting.

-- Justice Kennedy's unusual *mea culpa*: "The hard fact is that sometimes we must make decisions we do not like." 109 S. Ct. at 2548.

- Justice Stevens' penetrating simplicity:
  - "The question is unique." Id. at 2556. In other words, forget First Amendment principles: the flag is like no other symbol, consequently flag desecration cannot be analogized to any other form of expressive conduct.
  - "[T]he prohibition against desecration has absolutely nothing to do with the content of the message that the symbolic speech is intended to convey." Id. at 2557 n. *. Would we protect a dissident's right to extinguish the flame at Arlington Cemetery marking the grave of John F. Kennedy?

IV. CONCLUSIONS: ASSESSING EXPRESSIVE-CONDUCT CLAIMS TODAY

A. First Inquiry: What has the defendant done? Does it Qualify for First Amendment Protection?



"Pure Speech" ("the written or spoken word" -- Texas v. Johnson, 109 S. Ct. at 2540)

Expressive Conduct

Conduct

Pure political conduct (demonstrating, leafletting)

Other

Yes -- unless "disqualified" on some other ground (e.g., obscene, "fighting words," "clear and present danger," inconsistent with reasonable "time-place-manner" restrictions).

Johnson-Spence test: Does the defendant intend to convey a particularized message, and is the audience likely to understand it in context?

No -- if police can validly prohibit conduct (e.g., group sex on stage), that conduct isn't protected merely because the actors "simultaneously engage in a valid political dialogue." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973).

B. Second Inquiry: If the defendant's actions do qualify for First Amendment Protection, does the state have an interest in regulating those actions? What is that interest, and how compelling is it?

-- If the interest is "content-based" (whatever that means), then the state's interest must be compellingly strong.

-- A bare majority of the Supreme Court holds in Johnson that the governmental interest in fostering national unity is not compelling.

-- If the interest is "unrelated to the suppression of free expression," then the four-part O'Brien test is used to assess the government's interest: essentially, that interest must be "important or substantial," and it must be manifested in a way that minimizes the incidental abridgement of First Amendment rights.

C. Do you think it won't happen on your campus? From the December 3, 1989, edition of The New York Times:

Princeton

Veterans Attend Rally in Protest Of Flag Burning

PRINCETON, N.J. — Responding to a flag-burning episode at Princeton University last month, the New Jersey Chapter of the Ex-Prisoners of War rallied around Old Glory on the campus last week.

In a gathering sponsored by The Princeton Tory, a conservative student magazine, a dozen speakers denounced flag burning as an acceptable form of protest, criticized Students for Social Responsibility, the Princeton group that organized the Nov. 8 flag burning, and admonished students to respect their nation and its symbols.

Daniel Weiss, who served in Vietnam, urged: "Live within the Bill of Rights and the Constitution. Go ahead, write your Congressmen and Senators. But don't burn a flag."

Surrounded by Veterans

Another former serviceman went further. Spotting one of last month's flag burners among nearly 100 people, about a third of them students, at the rally, he challenged the student to burn a flag again. "You were protected when you burned your flag then, but I'll bury you here if you try it now," he said.

The student, Oleg Urminsky, who by this time was surrounded by jeering ex-servicemen, was hustled away by friends.

In November, Mr. Urminsky, a Czechoslovak-born junior now living in Hawaii, and Daniel Delaney, a sophomore from Albany, burned two small American flags as about 50 other students cheered and some 30 counterprotesters waved a giant flag and shouted "U.S.A., U.S.A."

At one point, Alexandra deCampi, a sophomore from Chester Heights, Pa., stole one of the flags the students planned to burn and kept it. Participants in last week's rally praised Ms. deCampi's "courage and patriotism."

Daniel Woods, who received the Distinguished Service Cross for service in the Vietnam War and heads the Forget-Me-Nots, a group concerned with finding soldiers missing in action, spoke of the emotional pain that many of the veterans felt when told of the incident. "It is something very close to my heart," he said.

Mr. Urminsky and Mr. Delaney have neither been reprimanded by the university nor arrested by the police, although Federal law now treats flag burning as illegal. One former prisoner, Arnold Schwartz, said: "We just want justice done. We want them arrested, and to go through the justice system. We do give a damn."

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